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License to Bill: The Validity of Coupling Automatic Subscription Renewals with Free Trial Offers by Online Services

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Cover Page Footnote

Corporate Associate, Kirkland & Ellis LLP. LL.M., James Kent Scholar, Columbia Law School. I wish to thank Professor Mavis Fowler-Williams for her guidance in writing this Article, as well as Alon Grinshpoon for his thorough comments and feedback.

License to Bill: The Validity of Coupling Automatic Subscription Renewals with Free Trial Offers by Online Services

Koren Grinshpoon*

A prominent and expanding list of online services rely on a business model which pairs free trial offers with subsequent automatic subscription renewals (e.g., Amazon Prime, Blue Apron, etc.). Offering free trials to lure new users, while employing automatic renewal clauses in its terms of use to perpetuate recurring revenue, poses a substantial legal risk to online services. Numerous claims citing unfair and deceptive business practices are filed each year against such online services, primarily raising issues of informed consent, adequate disclosure, and notice. This Article reviews applicable federal law and regulations, as well as the applicable laws of all fifty states, and examines the legal validity of this business model. This Article explores under which conditions such joint offers can be advertised as “free” and what legal requirements of consent, disclosure, and notice must be met in order for the subscription to automatically renew once the trial period lapses. By adhering to the guidelines and best practices outlined in this Article, online services may very well be able to retain their desired business model, while reducing users’ complaints and minimizing significant legal concerns.

* Corporate Associate, Kirkland & Ellis LLP. LL.M., James Kent Scholar, Columbia Law School. I wish to thank Professor Mavis Fowler-Williams for her guidance in writing this Article, as well as Alon Grinshpoon for his thorough comments and feedback.

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INTRODUCTION

Online services are rapidly expanding and gaining ground over traditional means of commerce.¹ Such rising dominance has promoted the adaptation of different business models aimed at user engagement and retention.² Subscription-based online services are emerging in almost every industry, with people purchasing groceries, beauty products, supplies, and entertainment over the internet.

On the hunt for a higher free-to-pay conversion rate,³ online services have adopted new and more aggressive strategies to attract and retain paid users, which were once reserved for magazines. Among such strategies is the *pairing of free trial offers with automatic subscription renewal provisions in the terms of use of such online services*. Essentially, these provisions provide for automatic periodical billing of the user's account following the free trial period—i.e., granting advance consent for automatic renewal of the user's subscription to the online service immediately following the free trial period's conclusion.

Although auto-renewing subscription-based services can benefit users by offering simplicity and ease of mind, the validity of coupling this feature with a free trial offer may be called into question, in light of federal and state restrictions under consumer protection and unfair and deceptive practices laws. Many users claim that they did not knowingly agree to subsequent payments for additional products and services following the end of the free trial period, and that the auto-renewal terms were not clearly disclosed to them. Accordingly, such users are filing suits.

¹ See Walter Loeb, *Why Retailers Must Restructure in 2016*, FORBES (Jan. 4, 2016), <https://www.forbes.com/sites/walterloeb/2016/01/04/every-sign-is-saying-retailers-must-restructure-in-2016> [<https://perma.cc/6SCR-4FM5>]; see also *Retail Trends 2017*, DELOITTE, <https://www2.deloitte.com/uk/en/pages/consumer-business/articles/retail-trends-2017.html> [<https://perma.cc/7WGN-2CWU>] (last visited Mar. 18, 2017).

² See *infra* note 6 and accompanying text.

³ That is, turning users who use the service on a free trial basis into paying subscribers who incur recurring fees. Telemarketing Sales Rule, 16 C.F.R. § 310.2(p) (2015) (defining free-to-pay conversion as “in an offer or agreement to sell or provide any goods or services, a provision under which a customer receives a product or service for free for an initial period and will incur an obligation to pay for the product or service if he or she does not take affirmative action to cancel before the end of that period”).

This Article reviews the applicable law and corresponding business practices, and examines the validity of a business model that couples auto-renewing subscription with a preceding free trial. It considers whether the pairing of such two offers into one tempting bundle deceives users, and allows online services to unfairly profit by disguising a subscription-based service as a free trial. The Article explores under which conditions such joint offers may be advertised as “free,” and the requirements for a subscription to automatically renew once the trial period lapses.

This Article is structured to follow the main legal requirements under the federal Restore Online Shopper’s Confidence Act⁴ and the California Automatic Purchase Renewals statute⁵ regarding: (i) affirmative and informed *consent*; (ii) clear and conspicuous *disclosure* of terms; and (iii) *notice* of renewal terms, cancellation policy, and any other material changes to terms of service. Part I begins with a discussion of the current trend of prominent online services coupling auto-renewing subscription models with free trials, and suggests possible explanations for choosing such a business model. The three parts that follow tackle the three aforementioned requirements under federal and state law, respectively. Part II examines the need for online services to obtain users’ affirmative and informed consent, and compares such practice to other marketing practices, such as negative options plans. Part III reviews the need for online services’ clear and conspicuous disclosure with respect to free trials and auto-renewal terms. Part IV assesses the requirement for notice of renewal nearing the end of a trial period, or of any material changes to the terms of use of the online service. Lastly, Part V offers guidelines and best practices which allow online services to retain their desired business model of pairing auto-renewing subscriptions with free trials, while adhering to federal and state law.

⁴ 15 U.S.C. §§ 8401–8405 (2012).

⁵ CAL. BUS. & PROF. CODE §§ 17600–17606 (Deering 2009).

I. CURRENT TREND AND PRACTICE

Default opt-out automatic subscription renewal models paired with free trial offers have become more prominent in recent years as the strategy of choice for many companies looking to capture subscription revenue online and increase user retention.⁶ Advocates of automatic renewals praise their convenience and ability to ensure uninterrupted service for users who might forget to renew the service on their own.⁷ Critics, on the other hand, point to the initial free trial period, and argue that many online services utilize the auto-renewing feature to exploit its users' unsuspecting nature, as well as their tendency to forget, to unfairly boost their revenue stream.⁸

A notable example of this practice is Amazon.com, the biggest e-commerce retailer in the United States,⁹ and its paid subscription service, Amazon Prime. Amazon Prime provides users with free two-day shipping and access to exclusive content.¹⁰ Under the terms of use of Amazon Prime, the user's subscription automatically renews before his or her current subscription term

⁶ See SARAH FISTER GALE, THE ECONOMIST INTELLIGENCE UNIT, SUPPLY ON DEMAND: ADAPTING TO CHANGE IN CONSUMPTION AND DELIVERY MODELS 3 (Zoe Tabary ed., 2013), https://www.eiuperspectives.economist.com/sites/default/files/EIU_Zuora_WEB_Final.pdf [<https://perma.cc/B5V2-YCJF>].

⁷ See, e.g., *Norton Automatic Renewal Service Help*, NORTON BY SYMANTEC, https://support.norton.com/sp/en/us/home/current/solutions/kb20080417115558EN_EndUserProfile_en_us [<https://perma.cc/A35F-7NLH>] (last visited Mar. 18, 2017) (“The Norton Automatic Renewal service . . . keeps your Norton product up to date and your computer protected without you having to worry about it.”).

⁸ See, e.g., NIR EYAL, HOOKED: HOW TO BUILD HABIT-FORMING PRODUCTS 12 (Ryan Hoover ed., 2014) (discussing an emerging concept dubbed “habit-forming technology,” whereby innovators create products using “techniques to influence people decisions and affect behavioral outcomes”). Companies can avoid such possible deception by focusing on the design and development of interactive technologies which change users' behavior through habit forming rather than trickery. See *id.* at 10–13.

⁹ See *2017 Top [Fifty] E-Retailers Chart*, NAT'L RETAIL FED'N, <https://nrf.com/2017-top-50-e-retailers-chart> [<https://perma.cc/96GP-4X5E>] (last visited Nov. 11, 2017); see also Arthur Zaczekiewicz, *Amazon, Wal-Mart and Apple Top List of Biggest E-commerce Retailers*, WWD (Apr. 7, 2017), <http://wwd.com/business-news/business-features/amazon-wal-mart-apple-biggest-e-commerce-retailers-10862796/> [<https://perma.cc/XWQ7-3ZK8>].

¹⁰ *About Amazon Prime*, AMAZON, <https://www.amazon.com/gp/help/customer/display.html?nodeId=200444160> [<https://perma.cc/A7NF-WXLP>] (last visited Mar. 18, 2017).

expires.¹¹ A user must actively cancel his or her subscription to prevent incurring membership fees.¹² Yet it is important to note that enrollment in the Amazon Prime service is labeled a thirty-day free trial, followed by a monthly fee, which users can cancel along with the subscription at any time.¹³ While the “free” aspect of the service is highly stressed, an observant user will notice that he or she is agreeing in advance to periodical billing following the thirty-day free trial period.¹⁴

Apple has previously launched Apple Music service¹⁵ (“iTunes”) with a similar premise, under which users receive the first three months at no charge yet automatically agree for an auto-renewal payment option after the trial ends.¹⁶ SoundCloud, an online audio distribution platform, is also based on subscription plans that automatically renew on a monthly or yearly basis following a thirty-day free trial period, requiring the user to opt-out from renewing their subscription.¹⁷ Most notably, meal delivery services such as Blue Apron and HelloFresh have their business models based on automatic renewals and continuous subscriptions.¹⁸ Both services also occasionally offer free trials or

¹¹ See *Amazon Prime Terms*, AMAZON, <https://www.amazon.com/gp/help/customer/display.html?nodeId=13819201> [<https://perma.cc/KN8J-3K6T>] (last visited Mar. 18, 2017).

¹² See *Sign up for the Amazon Prime Free Trial*, AMAZON, https://www.amazon.com/gp/help/customer/display.html/ref=hp_13819211_signuptrial?nodeId=200444170 [<https://perma.cc/98AS-5ZH9>] (last visited Mar. 18, 2017) (“While you won’t be charged for your free trial, you will be automatically upgraded to a paid membership plan at the end of the trial period.”).

¹³ See *Try Prime*, AMAZON, https://www.amazon.com/gp/product/B00DBYBNEE/ref=nav_prime_try_btn [<https://perma.cc/JZZ7-9YNX>] (last visited Mar. 18, 2017).

¹⁴ See *Sign up for the Amazon Prime Free Trial*, *supra* note 12.

¹⁵ *Apple Music*, APPLE, <https://www.apple.com/music> [<https://perma.cc/2MRF-BSS8>] (last visited Mar. 18, 2017).

¹⁶ Thorin Klosowski, *How to Turn Off the Automatic Subscription Renewal in Apple Music*, LIFEHACKER (June 30, 2015), <http://lifehacker.com/how-to-turn-off-the-automatic-subscription-renewal-in-a-1714905341> [<https://perma.cc/5L8Q-SGZV>].

¹⁷ See *Automatic Subscription Renewals*, SOUND CLOUD, <http://payments.help.soundcloud.com/customer/portal/articles/2159405-automatic-subscription-renewals> [<https://perma.cc/UE6Q-Z5J4>] (last visited Mar. 18, 2017).

¹⁸ See *Terms and Conditions*, HELLOFRESH, <https://www.hellofresh.com/termsandconditions> [<https://perma.cc/VPF3-2CYM>] (last visited Mar. 18, 2017); *Terms of Use*, BLUE APRON, <https://www.blueapron.com/pages/terms> [<https://perma.cc/VKJ5-PWTM>] (last visited Mar. 18, 2017).

special promotions for new users. However, Blue Apron provides in its terms of service that by using the service the user acknowledges and agrees that once the free trial ends, the service will begin billing the user on a recurring basis for as long as the subscription continues, unless he or she cancels the subscription prior to the end of the free trial.¹⁹ The user therefore agrees to pay recurring payments prior to the beginning of the free trial period, to be charged at its end.²⁰ HelloFresh's terms specifically provide that it may submit periodic charges without further authorization from the user, until he or she provides advance notice that they wish to terminate this authorization.²¹ HelloFresh's terms further provide that by subscribing to the service, the user agrees to pay periodic subscriptions for an indefinite time until deactivated.²² The user's subscription is automatically extended for successive renewal periods of the same length, at the then-current non-promotional subscription rate.²³

In contrast, other services—such as Microsoft's Office 365—provide an opt-in option that allows users to choose whether their subscription will renew automatically following the end of the current subscription period.²⁴ However, this option is not offered by default and requires the user to take action.²⁵ Microsoft rewards users who choose such option for longer renewal increments by providing them with a lower per-month fee.²⁶ This model of user retention allows for maximum user control.

¹⁹ See *Terms of Use*, *supra* note 18.

²⁰ See *id.*

²¹ See *Terms and Conditions*, *supra* note 18.

²² See *id.*

²³ See *id.*

²⁴ See *Renew Office 365 for Home*, MICROSOFT, <https://support.office.com/en-us/article/Renew-Office-365-for-home-58f3d0f8-15c4-4ad8-8c5f-16d682e8b545?ui=en-US&rs=en-US&ad=US> [<https://perma.cc/5YG3-7SXD>] (last visited Mar. 18, 2017).

²⁵ See *Automatic Renewal*, Section of *Microsoft Services Agreement*, § 9(e), MICROSOFT, <https://www.microsoft.com/en-US/servicesagreement/> [<https://perma.cc/4U57-FHBF>] (last visited Mar. 18, 2017).

²⁶ *Subscription Renewal*, MICROSOFT, <https://products.office.com/en-US/buy-office-365-home?ms.officeurl=renew> [<https://perma.cc/DP3K-B3W2>] (last visited Mar. 18, 2017) (comparing consumers' potential savings by opting into an annual renewal plan rather than on a costlier monthly basis).

The practice of free trials, which is aimed at introducing the service to new users, is exercised differently by software service providers. Many downloadable software programs, as well as online software-as-a-service (“SaaS”) providers, offer free trials for their services but have time limits on their use. Software is distributed or given access to under a “trialware” software license, according to which a user may experience the usefulness of the fully functional program, with all features available.²⁷ However, the program is restrained by a built-in time limit that reverts it to a non-functional or a reduced-functionality state when the time lapses, unless the user decides to pay a license fee and unlock the full potential of the software.²⁸ Winrar, a file archiver utility program,²⁹ is a famous example of a program distributed under a trialware software license and a “try before you buy” policy, which is free of charge for forty days, following which an end-of-trial notice appears.³⁰

Most online SaaS providers license their software under an initial trialware license based on the assumption that potential users desire an opportunity to examine the entire functionality of the product prior to purchasing it.³¹ The conversion of free trial users to paying customers is usually made on an opt-in basis

²⁷ See, e.g., *Trialware*, SYMANTEC, <https://www.symantec.com/en/uk/products-solutions/trialware> [<https://perma.cc/3D8N-ARHV>] (last visited Mar. 18, 2017).

²⁸ See, e.g., *id.* (“Download trialware to evaluate full versions of our products for a limited time. At the end of the trialware process, you’ll be prompted to purchase a license to continue your use of the product.”).

²⁹ See RARLAB, <http://rarlab.com> [<https://perma.cc/Y3GT-BC99>] (last visited Mar. 18, 2017).

³⁰ See *End User License Agreement (EULA)*, WINRAR, <https://www.win-rar.com/winrarlicense.html> [<https://perma.cc/6WG3-S7YU>] (last visited Mar. 18, 2017). Anecdotally, unlike most software services, Winrar does not actually have any technical mechanism to disable users’ activity following the end of the trial period, allowing users to continue their use of the program long after the trial period expires. See David Grossman, *Why WinRAR’s [Forty] Day Trial Actually Lasts Forever*, POPULAR MECHANICS (Mar. 14, 2017), <http://www.popularmechanics.com/culture/web/a25679/winrar-infinite-40-day-trial/> [<https://perma.cc/7JLP-HH5G>].

³¹ See TOTANGO, 2012 SAAS FREE TRIAL FREEMUM AND PRICING BENCHMARK 2–3 (2014), <http://www.totango.com/wp-content/uploads/2012/04/2012-SaaS-Free-Trial-Freemium-Pricing-Benchmark.pdf> [<https://perma.cc/74CX-2V97>].

following the end of the trial period.³² Contrary to such practice, default opt-out auto-renewing subscription provisions, which are often added in the terms of use of many other online services, make the conversion automatic. This model is seemingly aimed at improving user retention and increasing renewal rates without optimizing the service's marketing efforts.³³ Through a more seamless automatic renewal process, online services enjoy a higher retention and higher free-to-pay conversion rate as well as lower costs for such retention.³⁴

Online services may also enjoy revenue from retained users who would otherwise not renew their subscriptions for reasons of omission (i.e., wanted to renew but forgot) or commission (i.e., would not like to pay but forgot to cancel). Opting-out rather than opting-in shifts the onus to the users and requires them to exercise a higher degree of attention, as well as expend more effort and time. One can realistically assume that some users will forget or will not notice or find time to opt-out. Also, primarily focusing on the free trial aspect of the registration to the service, while relying on users' tendency not to read the fine print of the offer or the applicable service's terms of use, may suggest that some online services disguise a subscription-based service as a free-of-charge trial.³⁵

The hypothesis that auto-renewing services enjoy an increase in user retention rate, and thereby an increase in revenue, is supported by empirical testing that suggests that users' ability to cancel the subscription during or following the trial period is not as easy as advertised. For example, canceling one's Amazon Prime

³² Cf. TOTANGO, 2012 SAAS CONVERSIONS BENCHMARK BENCHMARK 2-3, <http://www.totango.com/wp-content/uploads/2012/11/2012-SaaS-Conversions-Benchmark2.pdf> [<https://perma.cc/8HEW-3J2L>] (last visited Jan. 17, 2018).

³³ See Matt Shanahan, *Want to Increase Revenue? Stop Selling and Start Billing.*, SCOUT RES. (June 4, 2013), <http://scout2.stonefieldtech.com/customer-success-management/want-to-increase-revenue-stop-selling-and-start-billing/> [<https://perma.cc/D5XY-F25T>].

³⁴ See Craig Vodnik, *How Do You Handle Subscription Renewals?*, CLEVERBRIDGE (Mar. 28, 2011), <https://www.cleverbridge.com/corporate/how-do-you-handle-subscription-renewals> [<https://perma.cc/YEP8-KK9M>].

³⁵ See "Free" Trial Offers?, FED. TRADE COMM'N (Apr. 2011), <https://www.consumer.ftc.gov/articles/0101-free-trial-offers> [<https://perma.cc/PJ39-ZA7Z>].

subscription requires the following steps: (1) choosing between three home page menus (“Accounts & Lists,” “Orders,” and “Prime”)³⁶ and choosing “Accounts & Lists”,³⁷ (2) reviewing a total of thirty-five options from a drop-down menu that include items such as “Your Account,” “Memberships & Subscriptions,” and “Your Prime Membership,” and choosing the latter,³⁸ (3) reentering your account email and password; (4) choosing the third option of “Do not continue my trial” out of four options now visible on a side Menu displayed on the page;³⁹ (5) and finally, confirming your decision to cancel membership.⁴⁰ One may argue that this is quite a hassle even for highly motivated users. Another example is HelloFresh’s deactivation policy.⁴¹ A user who desires to cancel his or her HelloFresh account cannot do so from the settings or account menu. Rather, the user must enter the delivery schedule and choose the next delivery date visible on the calendar, and can only deactivate the account there—not before being offered several times to change the delivery schedule instead of deactivating the account completely.⁴² This process is arguably not intuitive even for tech-savvy users.

In accordance with the rising trend of coupling automatic subscription renewals with free trials into one tempting bundle, an increasing number of states have enacted laws regulating automatic renewals and free trial offers.⁴³ As subsequently discussed in this Article, the restrictions and requirements under federal and

³⁶ See AMAZON, <https://www.amazon.com/> [<https://perma.cc/6QYV-REVF>] (last visited Jan. 17, 2018) (showing these three options in the top-right banner of the homepage).

³⁷ *Accounts & Lists*, AMAZON, https://www.amazon.com/gp/css/homepage.html/ref=nav_youraccount_btn [<https://perma.cc/SS8F-3QAK>] (last visited Mar. 18, 2017).

³⁸ *Manage Your Prime Membership*, AMAZON, https://www.amazon.com/gp/primecentral?ie=UTF8&ref_=ya_manage_prime (last visited Jan. 17, 2018).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *How to Manage Your Account*, HELLOFRESH, <https://www.hellofresh.com/managingsubscriptions> [<https://perma.cc/NDC4-BSKB>] (last visited Mar. 18, 2017).

⁴² *Menu Overview*, HELLOFRESH, <https://www.hellofresh.com/my-account/deliveries/calendar> (last visited Jan. 17, 2018).

⁴³ Appendix A to this Article provides detailed descriptions of each piece of legislation with respect to free trial offers, while Appendix B provides such descriptions with respect to automatic renewals.

different state laws vary, yet all tackle three similar issues that arise from choosing such a business model: primarily, issues of *consent*, *disclosure*, and *notice*. Respectively, each of the following three parts discusses the legal requirements relating to each of these issues.

II. FIRST ISSUE: CONSENT

The first issue that the aforementioned business model raises under current federal and state law is one of consent. As in all free-market transactions, a buyer (i.e., the user) must accept a seller's offer (i.e., the online service provider) to form a contract between the parties. Stated differently, an online service provider must obtain the user's consent to its terms of use. One must wonder what actions a user should take to express his or her consent, and what actions an online service provider may take to ratify or nullify such consent.

A. *Consent to the Free Trial Offer*

By highly emphasizing the free trial aspect of the offer, online services allegedly lure new potential users and channel their desire to test the service, seemingly under no additional future obligation. However, instead of having the trial period lapse and then offer users the service for a recurring fee (an "opt-in" option) during the initial registration, users continue and pay for the service after the trial period ends, unless they cancel their subscription (an "opt-out" option).⁴⁴ If the free trial offer is simultaneously conditioned on a revocable commitment to pay for an automatically renewed subscription, one might wonder how "free" is this offer really? Moreover, if the spotlight is meticulously and deliberately focused on the free trial aspect of the service rather than its auto-renewing nature, one might argue that such tactic frustrates a user's ability to provide his or her informed consent to subscribe to the service. If that is the case, a preliminary question one should ask is whether one can label and market such bundled offer as "free"?

⁴⁴ See generally *supra* Part I.

The Federal Trade Commission (“FTC”) has promulgated rules regarding the use of the word “free” in free trial offers that give users the opportunity to try out the service before subscribing to it. According to the “Guide Concerning Use of the Word ‘Free’ and Similar Representations,”⁴⁵ sellers must only present an offer as “Free” with extreme care so as to avoid any possibility that users will be misled or deceived.⁴⁶ The rule makes clear that the word “Free” indicates that the user is paying nothing for the service or product, “and no more than the regular price for” an additional service or product.⁴⁷ The rule further stresses that a user “has a right to believe that the [service] will not directly and immediately recover, in whole or in part, the cost of the free [service] by marking up the price of the” part of the service “which must be purchased, by the substitution of inferior [service], or otherwise.”⁴⁸

The rule refers to the more traditional cases of marketing (i.e., “buy one get one free”), but may also be applied to online services which offer free trial periods.⁴⁹ The rule dictates that no online services should impose charges on the user during the free trial period, nor should it impose any costs associated with the free trial period on the user through subsequent payments.⁵⁰ With respect to the latter, in the digital age, the costs online services incur for offering free trials are minimal at best (i.e., no manufacturing, shipping, or handling costs), making such requirement easy to satisfy. With respect to the former, online services should simply avoid charging users during or for such trial. If so, the online service may use the term “free” to address the trial period alone without fear of deception.

Notably, the rule is drafted and phrased to address service providers (which include online service providers) and regulate their behavior through certain disclosure and notice requirements,⁵¹

⁴⁵ 16 C.F.R. § 251.1 (2016).

⁴⁶ *Id.* § 251.1(a)(2).

⁴⁷ *Id.* § 251.1(b)(1).

⁴⁸ *Id.*

⁴⁹ See FED. TRADE COMM’N, *supra* note 35 (demonstrating the FTC’s consumer protection efforts with respect to online services).

⁵⁰ See 16 C.F.R. § 251.1(b)(1).

⁵¹ See *id.* § 251.1(a)–(c) (regulating the sale of merchandise and services).

further examined in later Parts. It does not explicitly require service providers to obtain a user's express informed consent to the free offer, since the rule's language focuses on the offer rather than the acceptance process.⁵² However, by adhering to such requirements, an online service provider may safely assume that the user's acceptance is made while exercising informed consent.

B. Consent to the Automatic Renewal Feature

The practice of automatic subscription renewals coupled with free trials, as well as similar marketing practices that rely on the user's advance consent, did not go unnoticed by federal and state legislatures. Accordingly, they enacted numerous laws to address the pitfalls of advance consent marketing—most notably negative option, continuous services, and continuity plans.

The FTC defined a negative option plan as a transaction under which the user's failure to take an affirmative action, by rejecting the offer or canceling the agreement, is deemed consent to be charged for goods or services, rather than his or her affirmative approval.⁵³ Online services which provide an automatic renewal subscription, following a free trial, essentially offer a negative option plan. Unless the user affirmatively deactivated his or her account or cancels the continued delivery of products, he or she will be charged for the service. The FTC and state enforcement agencies eventually scrutinized such practice.⁵⁴ Many claimants asserted that they were charged subscription fees without having agreed to automatic renewals of their subscription or to the payable

⁵² See *id.* § 251.1.

⁵³ See Use of Prenotification Negative Option Plans, 16 C.F.R. § 425.1(c)(1) (2016). The term “[n]egative option plan” is defined as:

[A] contractual plan or arrangement under which a seller periodically sends to subscribers an announcement which identifies merchandise (other than annual supplements to previously acquired merchandise) it proposes to send to subscribers to such plan, and the subscribers thereafter receive and are billed for the merchandise identified in each such announcement, unless by a date or within a time specified by the seller with respect to each such announcement the subscribers, in conformity with the provisions of such plan, instruct the seller not to send the identified merchandise.

Id. (emphasis in original).

⁵⁴ FED. TRADE COMM’N, *supra* note 35.

continuation of the free trial.⁵⁵ Many have also raised the issue that they were not adequately informed about the subscription or how to cancel it.⁵⁶

Accordingly, the FTC, as well as many state legislatures and attorneys general, took steps to regulate negative options and automatic renewal subscription plans. In 1973, the FTC enacted rule 16 C.F.R. § 425.1 regarding the use of pre-notification negative option plans,⁵⁷ which was amended in 1998, to tackle the issue.⁵⁸ The rule established the basic requirements for companies that employ negative option plans.⁵⁹ The negative option rule aspires to ensure that companies obtain the consumer's affirmative consent to any offer that entails incurring a financial obligation.⁶⁰ However, the rule only applies to one specific type of negative option plan, which is common in the magazine industry, where consumers get periodic announcements about upcoming shipments, have a period of time to decline, and then receive the item if they do not do so.⁶¹ Therefore, its applicability to online services and their business practice of auto-renewals is quite limited.

In 2010, Congress enacted sections 8401 through 8405 of title 15 of the U.S. Code to better address online transactions, including negative options.⁶² The Restore Online Shopper's Confidence Act ("ROSCA") defined a "negative option feature" in the same manner as it was defined in FTC rule 16 C.F.R. § 310: "[I]n an offer or agreement to sell or provide any goods or services, a provision under which the customer's silence or failure

⁵⁵ See *infra* notes 112–15, 121, 124–39 and accompanying text.

⁵⁶ See *infra* notes 112–15, 121, 124–39 and accompanying text.

⁵⁷ 16 C.F.R. § 425.1.

⁵⁸ See *id.* In 2014, the FTC reexamined the rule again and decided to keep it in its current form. See Press Release, Fed. Trade Comm'n, FTC Will Keep Negative Option Rule in Its Current Form (July 25, 2014), <https://www.ftc.gov/news-events/press-releases/2014/07/ftc-will-keep-negative-option-rule-its-current-form> [<https://perma.cc/XF8C-JZ6L>].

⁵⁹ See 16 C.F.R. § 425.1.

⁶⁰ See *id.* § 425.1(b).

⁶¹ Lisa Weintraub Schifferle, *Negative Options – Make Them a Positive*, FED. TRADE COMM'N (Sept. 22, 2016), <https://www.ftc.gov/news-events/blogs/business-blog/2016/09/negative-options-make-them-positive> [<https://perma.cc/DR4C-KAMP>].

⁶² Restore Online Shopper's Confidence Act, 15 U.S.C. §§ 8401–8405 (2012).

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.”⁶³ As mentioned, such negative option feature includes automatic renewal subscriptions offered by many online services.

As a general rule, ROSCA prohibits the use of a negative option feature in online services transactions.⁶⁴ However, such a feature may be adopted if, inter alia, the user provides his or her “*express informed consent*” before any charges or subsequent payments are made.⁶⁵ The Act does not explicitly state what constitutes “obtain[ing] a consumer’s express informed consent” with respect to the negative option feature, yet it does in the context of sales conducted through an online service.⁶⁶ There, the Act mandates that for a “post-transaction third party seller [to] receive[] the express informed consent” of a user, the seller must: (1) obtain “the full account number of the account to be charged” as well as the user’s “name and address and a means to contact;” and (2) “requir[e] the [user] to perform an additional affirmative action, such as clicking on a confirmation button or checking a box that indicates the [user]’s consent to be charged the amount disclosed.”⁶⁷ One may very well interpret such requirements to apply to the negative option feature as well. Therefore, one may conclude that the act prohibits online service providers from turning a free trial into a paid subscription without first procuring the user’s personal details, as well as his or her affirmative consent. In par with industry practice, requiring a user to check a box stating “*I agree*” should satisfy this opt-in requirement.⁶⁸

⁶³ Telemarketing Sales Rule, 16 C.F.R. § 310.2(u) (2016); *see also id.* § 8403 (“It shall be unlawful for any person to charge . . . on the Internet through a negative option feature (as defined in the Federal Trade Commission’s Telemarketing Sales Rule in part 310 of title 16, Code of Federal Regulations) . . .”).

⁶⁴ *See* 15 U.S.C. § 8403.

⁶⁵ *Id.* § 8403(2).

⁶⁶ *Compare id.*, with *id.* § 8402(a)(2).

⁶⁷ *Id.* § 8402(a)(2).

⁶⁸ *Id.* Similarly, California’s Automatic Purchase Renewals statute, CAL. BUS. & PROF. CODE §§ 17600–17606 (Deering 2009)—which serves as a model for other state statutes—also requires an online service provider to obtain affirmative consent before charging users on a recurring basis. *See id.* § 17602(a)(2). As in ROSCA, the statute does not define what constitutes affirmative consent. *Compare id.* §§ 17600–17606, with 15 U.S.C. §§ 8401–8405. Under the industry practice, it seems that checking a box stating,

Online services may secure such consent at the time the user first subscribes to the service and begins his or her free trial.⁶⁹

The FTC and state attorneys general are assigned to enforce the Act, and are authorized to penalize online services that use negative option features illegally.⁷⁰ Accordingly, a large number of states have passed statutes that regulate negative options and limit the practice of automatic renewals, some of which impose more burdensome obligations than ROSCA or the FTC's Negative Option Rule. Those states are Alaska, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Kentucky, Louisiana, North Carolina, Oregon, and Utah.⁷¹ The following states have adopted similar laws which apply only to contracts in specific industries, such as telecommunications, electricity and gas, or health club membership: Arkansas, Colorado, Iowa, Maryland, Missouri, Montana, Nebraska, New Hampshire, New York,⁷² Ohio, Rhode Island, South Carolina, South Dakota, Tennessee, and Wisconsin.⁷³ Similar bills were also introduced in Indiana,⁷⁴ Kansas,⁷⁵ Maine,⁷⁶ Maryland,⁷⁷ Michigan,⁷⁸ Mississippi,⁷⁹ Nevada,⁸⁰ Pennsylvania,⁸¹

"I agree" should indeed suffice. *See, e.g.,* *Ingalls v. Spotify USA, Inc.*, No. C 16-03533 WHA, 2016 U.S. Dist. LEXIS 157384, at *2-3 (N.D. Cal. Nov. 14, 2016) (showing the court casually assumed that by clicking the "Accept" button, the plaintiff accepted the terms and conditions of the service).

⁶⁹ Most notably Amazon. *See Amazon Prime Terms*, *supra* note 11.

⁷⁰ *See* 15 U.S.C. §§ 8404-8405.

⁷¹ *See* Appendix B for a detailed description of each piece of legislation.

⁷² A broader auto-renewal law was introduced in the New York Senate in early 2015, mimicking California's Automatic Purchase Renewals statute, BUS. & PROF. §§ 17600-17606, which would require companies to obtain the user's affirmative consent to any automatic renewal or continuous service, yet it died in committee. *See* S. 40-A, 201st Gen. Assemb., 2015-2016, Reg. Sess. (N.Y. 2015); *NY S00040 | 2015-2016 | General Assembly*, LEGISCAN, <https://legiscan.com/NY/bill/S00040/2015> [<https://perma.cc/XER7-AEUG>] (last visited Nov. 12, 2017) ("Introduced on January 7[,] 2015 - [twenty-five percent] progression, died in committee . . .").

⁷³ *See* Appendix B.

⁷⁴ S.B. 300, 117th Gen. Assemb., Reg. Sess. (Ind. 2011).

⁷⁵ H.B. 2150, 84th Legis., 2011 Reg. Sess. (Kan. 2011).

⁷⁶ H. Paper 613, 127th Legis., 2015 Reg. Sess. (Me. 2015).

⁷⁷ H.B. 239, 427th Gen. Assemb., 2010 Reg. Sess. (Md. 2010).

⁷⁸ S.B. 248, 97th Legis., 2013 Reg. Sess. (Mich. 2013).

⁷⁹ H.B. 645, 127th Legis. Sess., 2007 Reg. Sess. (Miss. 2007).

⁸⁰ S.B. 290, 76th Reg. Sess. (Nev. 2011).

⁸¹ S.B. 991, 195th Gen. Assemb., 2011 Sess. (Pa. 2011).

and Texas,⁸² yet died or were held up in committee. Georgia has enacted a rule regarding negative option plans, which was later repealed.⁸³ Vermont,⁸⁴ Minnesota,⁸⁵ and New Jersey⁸⁶ are currently considering acts relating to automatic renewal provisions in consumer contracts.

Most statutes impose the same ROSCA requirements of express informed consent, clear and conspicuous disclosure⁸⁷ of auto-renewal terms, and notice of the renewal to allow cancellation of the subscription, but differ in breadth and depth. The consent requirement is usually implied or is more lenient than the stricter disclosure and notice requirements.⁸⁸ Most statutes further provide that any violation thereof constitutes an unfair or deceptive trade practice, and reserve a user's right to seek all available civil remedies, including restitution of subscription payments and recovery of attorneys' fees.⁸⁹ Specifically, California's Automatic Purchase Renewals statute provides that any product delivered "without first obtaining the [user]'s affirmative consent . . . [will] be deemed an unconditional gift to the [user]," with no obligation to pay for or return it.⁹⁰

⁸² H.B. 1702, 80th Leg. (Tex. 2007).

⁸³ See GA. COMP. R. & REGS. 122-4-0.01 (1993) (repealed 2016).

⁸⁴ H. 55, 2015–2016 Legis. Sess., Gen. Assemb. (Vt. 2015).

⁸⁵ H. File 1802, 89th Legis. Sess., Reg. Sess. (Minn. 2015).

⁸⁶ S. 1837, 217th Leg., Reg. Sess. (N.J. 2016).

⁸⁷ The FTC has published lengthy guidelines, which elaborate on the definition of a "clear and conspicuous" disclosure according to which if the disclosure of information is necessary to prevent an advertisement from being deceptive, the disclosure has to be clear and conspicuous. See FED. TRADE COMM'N, .COM DISCLOSURES: HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING 6 (2013), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf> [<https://perma.cc/4VCK-4JQZ>].

⁸⁸ Only Alaska, California, and Oregon explicitly require users' consent. See Appendix B.

⁸⁹ See *id.*

⁹⁰ CAL. BUS. & PROF. CODE § 17603 (Deering 2009).

III. SECOND ISSUE: CLEAR AND CONSPICUOUS DISCLOSURE

The second issue that calls into question the validity of coupling automatic subscription renewals with free trial offers is one of clear and conspicuous disclosure. Under federal and state laws, online services must provide their users with a clear and conspicuous disclosure of the terms and conditions governing the free trial offer as well as the automatic renewal feature.

A. Disclosure Regarding the Free Trial Offer

The first prong of this subscription model is a free of charge trial period that precedes automatically renewing subscription periods, which are paid for by recurring payments that the user must authorize at the beginning of the trial. FTC rule 16 C.F.R. § 251.1 requires that the “terms, conditions and obligations upon which receipt and retention of the ‘Free’ item are contingent should be set forth clearly and conspicuously at the outset of the offer so as to leave no reasonable probability that the terms of the offer might be misunderstood.”⁹¹ The Guide Concerning Use of the Word “Free” and Similar Representations underscores that “all of the terms, conditions and obligations should appear in close conjunction with the offer of ‘Free’ merchandise or service,” and provides some traditional examples of such advertising.⁹² However, the rule provides:

[M]ere notice of the existence of a ‘Free’ offer on the main display panel . . . is not precluded provided that (1) the notice does not constitute an offer or identify the [service as] being offered [for] ‘Free’, (2) the notice informs the [user] of the location . . . where the [required] disclosures may be found, (3) no purchase or other such material affirmative act is

⁹¹ Guide Concerning Use of the Word “Free” and Similar Representations, 16 C.F.R. § 251.1(c) (2016).

⁹² *Id.* The rule explicitly mentions, for example, that “disclosure of the terms of the offer set forth in a footnote of an advertisement to which reference is made by an asterisk or other symbol placed next to the offer, is not regarded as making disclosure at the outset.” *Id.* Apple Music Service, most prominently, uses this exact tactic. *Apple Music*, *supra* note 15 (offering to “[t]ry it free for three months*[,]” with an asterisk referring to text at the bottom of the page that states, “Plan automatically renews after trial”).

required in order to discover the terms and conditions of the offer, and (4) the notice and the offer are not otherwise deceptive.⁹³

Applied to the practice of free trials coupled with an automatic renewal subscription, this means that the offer to try out the online service free of charge must clearly and conspicuously provide notice that while the trial itself is free, the user is also subscribing to subsequent payments for the service. Such disclosure must be located near the free trial offer, and must easily refer the user to all the terms and conditions of the offer. In practice, online services adhere to such requirements by adding a link under the free trial offer that refers to the service's terms of use webpage.⁹⁴ If so, stating that the trial period is free, while at the same time disclosing that future subscription charges will be billed, is not deemed deceptive under federal law. Stated differently, if disclosure is done properly, a business model based on automatic subscription renewals coupled with free trials will likely be valid, and will not be regarded as a periodic fee-based service disguised as a free of charge service.

Different states have also enacted laws that regulate the use of the term "Free," and impose specific disclosure requirements regarding the terms and conditions that may be associated with a free offer. Such states are Alaska, California, Connecticut, Florida, Hawaii, Maine, Michigan, Minnesota, New York, Ohio, Oregon, Utah, and Wisconsin.⁹⁵ Such rules were historically drafted in order to specifically target more traditional forms of advertising,⁹⁶ however their broad scope with respect to consumer protection enables one to also apply them to online services which offer free

⁹³ 16 C.F.R. § 251.1(c).

⁹⁴ See e.g., *Sign Up*, SPOTIFY, <https://www.spotify.com/us/signup/> [<https://perma.cc/T6TJ-M4N7>] (last visited Nov. 12, 2017).

⁹⁵ See Appendix A (providing detailed descriptions of each piece of legislation).

⁹⁶ See, e.g., CONN. GEN. STAT. § 42-126b (2017). This law is sectioned under the same chapter that deals with "Trading Stamps, Mail Orders, Franchises, Credit Programs and Subscriptions" (referencing CONN. GEN. STAT. ch. 739), while OHIO ADMIN. CODE 109:4-3-04 (2017) is nestled between sections that deal with bait advertising by salesperson, see *id.* 109:4-3-03, and services or repairs, see *id.* 109:4-3-05. None of the rules specifically refer to advertising over the internet. See CONN. GEN. STAT. § 42-126b; OHIO ADMIN. CODE 109:4-3-04.

trials. Such laws impose similar disclosure requirements, aimed at ensuring that the free trial offers are in fact free. Therefore, if the online service provides the trial period free of charge, and as long as the disclosure requirements are met, the online service can offer such a free trial while coupling it with a later automatic subscription renewal.⁹⁷

B. Disclosure Regarding the Automatic Renewal Feature

Businesses have long used automatic renewal clauses, also known as “evergreen clauses,” in their consumer and commercial contracts. Under such clauses, the term of the agreement automatically renews for a subsequent defined period of time, unless one of the parties provides prior notice of termination within a specific time.⁹⁸ Evergreen clauses allow the parties to maintain continuous business relations without the need to renegotiate the contractual terms governing such relations at the end of each defined term. Generally, depending on the jurisdiction, evergreen clauses in commercial contracts are valid and enforceable, where the contract language is clear and unambiguous.⁹⁹ However, with respect to consumer contracts and, more specifically, subscription agreements between users and online service providers, the validity and enforceability of automatic renewal clauses and auto-renewing charges provisions, are subject to additional scrutiny—i.e., a “clear and conspicuous” disclosure requirement.

⁹⁷ Note that the FTC has imposed additional disclosure requirements with respect to online advertising that may be applicable to online services, but such requirements fall outside the scope of this Article. *See, e.g.*, FED. TRADE COMM’N, *supra* note 87.

⁹⁸ A common form of an evergreen clause in a contract is as follows: “the term of this Agreement shall automatically renew for successive one (1) year terms unless terminated by either party by giving the other party a written notice of termination at least thirty (30) days prior to expiration of the then current term.”

⁹⁹ Based on the well-established legal principle of contract law in New York, if the contract terms are “clear and unambiguous,” the contract shall be enforced according to the plain meaning of such terms and “gleaned from within the four corners of the instrument,” without reference to “extrinsic evidence.” *RJE Corp. v. Northville Indus. Corp.*, 329 F.3d 310, 314 (2d Cir. 2003) (quoting *De Luca v. De Luca*, 751 N.Y.S.2d 766, 766 (N.Y. App. Div. 2002)); *see also* *Wiser v. Enervest Operating, L.L.C.*, 803 F. Supp. 2d 109, 116 (N.D.N.Y. 2011); *Greenfield v. Philles Records, Inc.*, 780 N.E.2d 166, 170 (N.Y. 2002); *Maser Consulting, P.A. v. Viola Park Realty, L.L.C.*, No. 0003404/2008, slip op. at 1 (N.Y. App. Div. Jan. 24, 2012).

ROSCA requires that any online service that includes an automatic renewal feature “provides text that clearly and conspicuously discloses all material terms of the transaction before obtaining the [user]’s billing information;” and his or her authorization to recurring automatic charges.¹⁰⁰ This clear and conspicuous disclosure requirement, as well as similar requirements under other applicable state laws, echo the definition contained in California’s Automatic Purchase Renewals statute (“CAPRS”), which was adopted in 2009, a year prior to the enactment of ROSCA.¹⁰¹

CAPRS requires that online service providers “present the automatic renewal offer terms . . . clear[ly] and conspicuous[ly,] . . . in . . . proximity . . . to the request for consent to the offer,” prior to the user agreeing to it.¹⁰² Under section 17601(c) of CAPRS, “clearly and conspicuously” means “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.”¹⁰³ The statute established a high legal standard under which online service providers must disclose the automatic renewal and cancellation terms in a more conspicuous manner than the rest of the terms of the agreement.¹⁰⁴ Such standard applies to all contracts entered into by users who are California residents, regardless of the online service’s place of business.¹⁰⁵

¹⁰⁰ 15 U.S.C. § 8403 (2012).

¹⁰¹ Compare CAL. BUS. & PROF. CODE § 17602(a)(1) (2009) (“It shall be unlawful . . . to do any of the following: (1) Fail to present the automatic renewal offer terms or continuous service offer terms in a clear and conspicuous manner before the subscription or purchasing agreement is fulfilled . . .”), with 15 U.S.C. § 8403.

¹⁰² BUS. & PROF. CODE § 17602(a)(1).

¹⁰³ *Id.* § 17601(c).

¹⁰⁴ See *supra* notes 102–03 and accompanying text. This standard of conspicuous disclosure, also adopted in ROSCA, adds a requirement that is more burdensome and specific than general obligations with respect to disclosure of terms under federal and state unfair competition and false advertising statutes. See, e.g., 15 U.S.C. § 45 (2012).

¹⁰⁵ The law applies to individual consumer contracts, not to business-to-business contracts. See BUS. & PROF. § 17601(d) (“‘Consumer’ means any individual who seeks or acquires, by purchase or lease, any goods, services, money, or credit for personal, family, or household purposes.”).

Many states have adopted the CAPRS definition, in varying degrees of strictness, to require companies to disclose automatic renewal policies in a clear and conspicuous manner.¹⁰⁶ Generally, having the automatic renewal disclosures at least as large as the surrounding text and the automatic renewal terms in immediate visual proximity to the user's signature or purchase authorization button satisfies the requirement.¹⁰⁷

The clear and conspicuous disclosure requirement has been the subject of many class actions, as well as FTC and state attorneys general enforcement actions, across the United States. With California being the home state of many prominent online services, CAPRS has become an emerging focal point of class action litigation against companies with consumer-facing online services that allegedly do not comply with its heightened disclosure requirement.¹⁰⁸ Many of the cases were later settled in California,¹⁰⁹ while others were dismissed on procedural

¹⁰⁶ Such states are Arkansas, Connecticut, Florida, Georgia, Hawaii, Illinois, Kentucky, Louisiana, Maryland, Missouri, North Carolina, Oregon, South Carolina, Tennessee, and Wisconsin. See Appendix B for detailed descriptions of each piece of legislation.

¹⁰⁷ Spotify is a prime example of an online service that follows this requirement. Following the initial registration, users can select the "Upgrade" option, which brings you to another webpage where a user is required to enter his or her credit information above the "Continue" button to start the thirty-day trial appears the following notice: "You are signing up for a [thirty]-day free trial. If you don't cancel before the trial ends, you authorize Spotify to automatically charge you \$9.99 [plus] applicable tax each month until you cancel. If the price changes, we'll notify you beforehand. You can check your renewal date or cancel anytime via your Account page No partial refunds. Trial Offer Terms . . . apply." See *Try Premium Free for [Thirty] Days*, SPOTIFY, https://www.spotify.com/us/purchase/panel/#__main-digitalriver (last visited Nov. 12, 2017); see also *Spotify® New [Thirty]-Days Free Trial Terms and Conditions*, SPOTIFY, <https://www.spotify.com/us/legal/new-30-days-free-trial-terms-and-conditions/> [<https://perma.cc/B2FE-VN2R>] (last visited Mar. 18, 2017).

¹⁰⁸ It is important to note that plaintiffs primarily act by way of a class action since the express language of the CAPRS does not create an individual private right of action, and courts have therefore abstained from recognizing such a new right of action for private parties. See *Roz v. Nestle Waters N. Am., Inc.*, No. 2:16cv-04418-SVW-JEM, 2017 U.S. Dist. LEXIS 5177, at *14–15 (C.D. Cal. Jan. 11, 2017) (order granting in part and denying in part defendant's motion to dismiss); see also *Mayron v. Google, Inc.*, No. 1-15-CV-275940, 2016 Cal. Super. LEXIS 173, at *6–7 (Santa Clara Cnty. Feb. 26, 2016) (order after hearing).

¹⁰⁹ See generally, e.g., *Williamson v. McAfee, Inc.*, Nos. 5:14-cv-00158-EJD; 5:14-cv-02475-EJD, 2016 U.S. Dist. LEXIS 116802 (N.D. Cal. Aug. 30, 2016) (order granting motion for final approval of class action; and granting motion for attorneys' fees

grounds.¹¹⁰ Plaintiffs in these cases typically claim that the online services charged users for recurring payments following either the expiration of a free trial period or an initial payment, without disclosing the terms in a clear and conspicuous manner.

For example, Birchbox, Inc., was sued and then settled a class action suit over its automatic renewal subscription policy.¹¹¹ The California-based online retailer offers customers personal care products, which it markets on a subscription basis that automatically renews for monthly deliveries of personal care products.¹¹² The complaint alleged that Birchbox's "automatic renewal . . . or continuous service . . . terms" were not explained "in a clear and conspicuous manner . . . before the subscription . . . was fulfilled."¹¹³ During the sign up process, the company allegedly did not place the terms near the checkbox that the initial claimant checked off to give her consent, and did not provide clear and conspicuous notice of the auto-renewal aspect of the service.¹¹⁴ Instead, such terms allegedly only appeared in the service's terms and conditions webpage in an insufficient manner.¹¹⁵ The claimant further argued that Birchbox's free trial offer did not include an

and costs and for service awards); *Berkson v. Gogo LLC*, No. 14-CV-1199, 2016 U.S. Dist. LEXIS 46632 (E.D.N.Y. Apr. 5, 2016) (applying California law); *Kruger v. Kiwi Crate*, No. 1-13-CV-254550, 2015 Cal. Super. LEXIS 447 (Santa Clara Cnty. July 1, 2015) (order granting final approval of class action settlement).

¹¹⁰ See generally, e.g., *Roz*, 2017 U.S. Dist. LEXIS 5177 (order granting in part and denying in part defendant's motion to dismiss); *Mazzola v. Roomster Corp.*, 849 F. Supp. 2d 395 (S.D.N.Y. 2012) (applying California law).

¹¹¹ See generally *Davis v. Birchbox, Inc.*, No. 3:15-CV-00498-BEN-BGS (S.D. Cal. Mar. 28, 2016), <https://secure.dahladmin.com/BIRCH/content/documents/PreliminaryApprovalOrder.pdf> (order granting plaintiffs' motion for preliminary approval of class settlement); *Consol. Amended Class Action Complaint at 1, LaPuebla v. Birchbox, Inc.*, No. 3:15-CV-00214-BEN-BGS (S.D. Cal. Mar. 28, 2016), <https://secure.dahladmin.com/BIRCH/content/documents/COMPLAINT.pdf> [hereinafter *Birchbox Complaint*]; *BIRCHBOX AUTOMATIC SUBSCRIPTION SETTLEMENT WEBSITE*, <https://secure.dahladmin.com/BIRCH/Index> (last visited Mar. 10, 2017).

¹¹² See *Terms and Conditions, BIRCHBOX*, <https://www.birchbox.com/about/terms-conditions> (last visited Mar. 18, 2017).

¹¹³ See *Birchbox Complaint*, *supra* note 111, at 1.

¹¹⁴ See *id.* at 12.

¹¹⁵ See *id.* at 10–11.

explanation on how to cancel the subscription prior to being charged with subsequent fees.¹¹⁶

A class action of a similar nature was also filed against Neopets, Inc., a virtual pet website, arguing that the online service violated CAPRS by automatically renewing users' memberships while failing to disclose such terms in a clear and conspicuous manner.¹¹⁷ The plaintiff claimed that instead of providing a clear disclosure regarding the auto-renewing nature of the service, Neopets only provided in small print at the bottom of the webpage: "For your convenience, after your current membership period ends, your membership will be automatically renewed using your credit card or PayPal account on file."¹¹⁸ However, the case was later dismissed without prejudice due to a joint stipulation signed by all parties.¹¹⁹

A wide and considerable array of companies, which provide auto-renewing subscription-based services, have faced similar class action suits, including: digital content providers (e.g., Apple¹²⁰), dating service providers (e.g., Tinder¹²¹), identity theft protection services (e.g., LifeLock¹²²), computer security software services (e.g., McAfee¹²³), feminine hygiene products providers

¹¹⁶ *See id.* at 22.

¹¹⁷ Class Action Complaint at 8–9, *Doe v. Neopets, Inc.*, No. 2:15-cv-08395 (C.D. Cal. Oct. 27, 2015), <https://www.truthinadvertising.org/wp-content/uploads/2015/11/Doe-v-Neopets-complaint.pdf>. [<https://perma.cc/9W3F-Y4L8>].

¹¹⁸ *Id.* at 9.

¹¹⁹ *See Johnson v. Neopets, Inc.*, No. CV 15-8395-DMG (PLAx), at *1 (C.D. Cal. Apr. 18, 2016), <https://www.truthinadvertising.org/wp-content/uploads/2015/11/Johnson-v-Neopets-dismissal.pdf> [<https://perma.cc/5NQ9-REPR>] (order granting dismissal without prejudice).

¹²⁰ *See* Stipulation and [Proposed] Order Granting Plaintiffs' Leave to File a Third Amended Complaint, *Siciliano v. Apple, Inc.*, No. 1-13-CV-257676, 2016 Cal. Super. LEXIS 977, at *5 (Santa Clara Cnty. June 2, 2016).

¹²¹ *See* Class Action Complaint at 13, *Manapol v. Tinder, Inc.*, No. 2:15-cv-03175 (C.D. Cal. Apr. 28, 2015), <https://www.truthinadvertising.org/wp-content/uploads/2015/06/Manapol-v-Tinder-complaint.pdf> [<https://perma.cc/3967-L8HV>].

¹²² *See Goldman v. Lifelock, Inc.*, No. 1-15-CV-276235, 2015 Cal. Super. LEXIS 207, at *2 (Santa Clara Cnty. July 24, 2015) (order after hearing).

¹²³ *See Williamson v. McAfee, Inc.*, Nos. 5:14-cv-00158-EJD; 5:14-cv-02475-EJD, 2016 U.S. Dist. LEXIS 116802, at *7 (N.D. Cal. Aug. 30, 2016) (order granting motion for final approval of class action settlement; and granting motion for attorneys' fees and costs, and for service awards).

(e.g., HelloFlo¹²⁴ and Birchbox¹²⁵), streaming video and music services (e.g., Hulu¹²⁶ and Spotify¹²⁷), data storage providers (e.g., DropBox¹²⁸ and Google¹²⁹), inflight internet service providers (e.g., Gogo, Inc.¹³⁰), theme parks (e.g., SeaWorld¹³¹), video games providers (e.g., Blizzard Entertainment¹³²), and subscription boxes and food delivery services (e.g., Blue Apron¹³³ and Kiwi Crate¹³⁴). Such class actions carry heavy legal expenses and can result in expensive settlements—for example, in the McAfee settlement case, the defendant bore the cost of the plaintiff's attorneys' fees, which were not to exceed \$2.4 million.¹³⁵

¹²⁴ See Class Action Complaint at 1, *Doe v. HelloFlo, Inc.*, No. 8:15-cv-01882 (C.D. Cal. Nov. 13, 2015), <https://www.truthinadvertising.org/wp-content/uploads/2015/11/Doe-v-HelloFlo-dismissal.pdf> [<https://perma.cc/LS2U-RTWS>].

¹²⁵ See Birchbox Complaint, *supra* note 111, at 1.

¹²⁶ See Class Action Complaint at 2, *Kruger v. Hulu, L.L.C.*, No. BC540053 (L.A. Cnty. Mar. 21, 2014) [hereinafter *Hulu Complaint*].

¹²⁷ See *Ingalls v. Spotify USA, Inc.*, No. C 16-03533 WHA, 2016 U.S. Dist. LEXIS 157384, at *2–3 (N.D. Cal. Nov. 14, 2016) (order denying motion to compel arbitration); Notice of Removal at 4, *Bleak v. Spotify USA Inc.*, No. CV-13-5653 (N.D. Cal. Dec. 6, 2013) [hereinafter *Spotify Notice of Removal*].

¹²⁸ See Notice of Removal at 2, *Goldman v. Dropbox, Inc.*, No. 3:14-cv-01453-CRB (N.D. Cal. Mar. 28, 2014). Notably, the same attorneys who brought the claims against Hulu and Spotify also filed this class action, which includes similar claims. *Compare* Class Action Complaint at 2, *Goldman v. Dropbox, Inc.*, No. CGC-14-537731 (S.F. Cnty. Feb. 28, 2014), *with* *Hulu Complaint*, *supra* note 126, at 1, *and* *Spotify Notice of Removal*, *supra* note 127, at 14–15. This may suggest that some lawyers are not only seasoned veterans with respect to such class actions but also the driving forces behind such suits.

¹²⁹ See *Mayron v. Google, Inc.*, No. 1-15-CV-275940, 2016 Cal. Super. LEXIS 173, at *2 (Santa Clara Cnty. Feb. 26, 2016) (order after hearing sustaining without leave to amend all of defendant's demurrers).

¹³⁰ See *Berkson v. Gogo LLC*, No. 14-CV-1199, 2016 U.S. Dist. LEXIS 46632, at *8–9 (E.D.N.Y. Apr. 5, 2016) (applying California law).

¹³¹ See Class Complaint at 6, *Herman v. SeaWorld Parks & Entm't, Inc.*, No. 8:14-cv-03028-MSS-JSS (M.D. Fla. Dec. 3, 2014).

¹³² See Class Action Complaint at 2, *Abrego v. Blizzard Entm't, Inc.*, No. 3:15-cv-00230-DMS-JLB (S.D. Cal. Feb. 5, 2015).

¹³³ See Notice of Removal at 2, *Riccobono v. Blue Apron, Inc.*, No. 2:15-cv-05521-JFW-PJW (C.D. Cal. July 21, 2015).

¹³⁴ See *Kruger v. Kiwi Crate*, No. 1-13-CV-254550, 2015 Cal. Super. LEXIS 447, at *1 (Santa Clara Cnty. July 2, 2015) (order granting final approval of class action settlement).

¹³⁵ See *Williamson v. McAfee, Inc.*, No. 5:14-cv-00158-EJD, 2016 U.S. Dist. LEXIS 116802, at *16 (N.D. Cal. Aug. 30, 2016) (order granting motion for final approval of class action; and granting motion for attorneys' fees and costs, and for service awards).

Similarly, the FTC and state attorneys general have acted to enforce the clear and conspicuous disclosure requirement under ROSCA. Since its enactment, the FTC has filed complaints against a number of companies, including DirecTV¹³⁶ and Health Formulas,¹³⁷ focusing on their disclosure policy. State attorneys general followed suit and acted to protect users from unfair or deceptive business practices related to automatic renewal policies. For example, forty-five states and the District of Columbia brought an enforcement action against Sirius XM Radio.¹³⁸ The satellite radio provider came under fire after subscriptions were automatically renewed without an adequate disclosure or cancellation mechanism, and without users' consent or knowledge.¹³⁹ Sirius XM agreed to pay \$3.8 million to settle the charges,¹⁴⁰ and undertook to clearly and conspicuously disclose the terms of its offers.¹⁴¹

¹³⁶ See Press Release, Fed. Trade Comm'n, FTC Charges DIRECTV with Deceptively Advertising the Cost of Its Satellite Television Service (Mar. 11, 2015), <https://www.ftc.gov/news-events/press-releases/2015/03/ftc-charges-directv-deceptively-advertising-cost-its-satellite> [<https://perma.cc/MX5Y-93RV>].

¹³⁷ See Press Release, Lesley Fair, Fed. Trade Comm'n, First FTC ROSCA Case Challenges Bogus BOGO and "Free" Claims (Oct. 21, 2014, 12:02 PM), <https://www.ftc.gov/news-events/blogs/business-blog/2014/10/first-ftc-rosca-case-challenges-bogus-bogo-free-claims> [<https://perma.cc/WQT9-RAHL>]; see also Press Release, Fed. Trade Comm'n, Marketers of Simple Pure Supplements Settle FTC Court Action (May 3, 2016), <https://www.ftc.gov/news-events/press-releases/2016/05/marketers-simple-pure-supplements-settle-ftc-court-action> [<https://perma.cc/49AB-Y9LG>].

¹³⁸ See Anne Bucher, *SiriusXM Multistate Settlement Program*, TOP CLASS ACTIONS (Dec. 9, 2014), <https://topclassactions.com/lawsuit-settlements/open-lawsuit-settlements/45508-siriusxm-multistate-settlement-program> [<https://perma.cc/8BYM-W5XG>].

¹³⁹ See Kelly Knaub, *Sirius to Pay \$3.8M to Settle [Forty-Four]-State False-Ad Suit*, LAW360 (Dec. 4, 2014), <https://www.law360.com/articles/601578/sirius-to-pay-3-8m-to-settle-44-state-false-ad-suit> [<https://perma.cc/SA8N-CMMN>]; see also Corilyn Shropshire, *SiriusXM Customers May Qualify for Settlement Share*, CHI. TRIB. (Dec. 4, 2014), <http://www.chicagotribune.com/business/ct-madigan-siriusxm-1205-biz-20141204-story.html>.

¹⁴⁰ See Knaub, *supra* note 139.

¹⁴¹ Indeed, SiriusXM's terms of use now clearly and conspicuously provide, in bold letters and in a distinguishable frame at the outset of the page, that the subscription may automatically renew. See *Customer Agreement & Website Terms of Use*, SIRIUSXM, https://www.siriusxm.com/pdf/siriusxm_customeragreement_eng.pdf [<https://perma.cc/A2CN-DMQJ>] (last updated Nov. 1, 2016).

A violation of CAPRS, as well as the other similar state laws, leads to harsh consequences. If a business fails to comply, the law treats all products rendered to users as unconditional gifts, with no obligation to pay for or return them.¹⁴² The law also entitles users to all available civil remedies, including restitution of all renewal payments made to the service, which an online service can negate by showing the online service's good faith compliance with the act.¹⁴³ Other state statutes void the user agreement and impose a monetary penalty for the violation.¹⁴⁴

Such outcomes pose a significant business risk to companies that deal with many individual users entering into contracts online.¹⁴⁵ Any online service provider that contracts with users from California, as well as the other states, on a subscription basis, must ensure that its service adheres to the clear and conspicuous disclosure requirements with respect to location, language, design, and format.¹⁴⁶ An online service provider may very well shield itself from unwarranted legal actions by bearing the costs associated with the review and amendment of the service and in compliance with the law.

IV. THIRD ISSUE: NOTICE

The third main legal requirement with respect to the subscription model is notice. Providing timely and periodic notice is an essential part of an online service provider's responsibilities towards its users. This Part assesses this requirement, both with respect to the free trial offer and the automatic renewal of the

¹⁴² See CAL. BUS. & PROF. CODE § 17603 (Deering 2009).

¹⁴³ See *id.* § 17604. See generally First Amended Complaint at 15, *Bleak v. Spotify USA, Inc.*, No. CGC-13-535309 (S.F. Cnty. Nov. 21, 2013) (seeking restitution of subscription payments made based on the claim under CAPRS, as well as other civil remedies such as injunctive relief, punitive damages, and attorney's fees under other applicable laws).

¹⁴⁴ See Appendix B.

¹⁴⁵ Indeed, although the law technically also covers regular hard-copy contracts, to date a lot of the litigation emanating from it has focused on online contracts. See *supra* notes 111–33 and accompanying text.

¹⁴⁶ See BUS. & PROF. § 17602(a)(1).

subscription, and examines when an online service should send such notice and what information it should include.

A. Notice Regarding the Free Trial Offer

The majority of state statutes regulating the use of free trial offers primarily focus on imposing disclosure requirements on the offeror. However, to ensure the validity of the user's conversion from a free trial to a paid subscription, a small number of states also include a notice requirement which allows users to cancel the trial prior to being charged for subsequent subscription periods.¹⁴⁷ Most other states dealt with the general issue of auto-renewing charges through legislation regarding automatic subscription renewals—not necessarily following a trial period—as further described in Section B of this Part.¹⁴⁸

Most prominently, New York law requires an online service to notify users “[at] least fifteen, but not more than thirty days” prior to the expiration of the free trial (or seven days if the trial period is less than thirty days).¹⁴⁹ However, the notice requirement does not apply if the online service does not charge the user's account, and instead “sends . . . an invoice requesting payment” for additional use of the service, “which includes information about how to cancel a free trial” (i.e., an opt-in option).¹⁵⁰ When coupled with an automatic renewal feature (i.e., an opt-out option), an online service that offers free trials must adhere to additional notice requirements.

B. Notice Regarding the Automatic Renewal Feature

In addition to affirmative consent and clear and conspicuous disclosure requirements, a third requirement appears in federal and state statutes when dealing with automatic renewal or continuous service: notice. The notice requirement's purpose is to maintain the user's control over the process by providing notice of the terms of

¹⁴⁷ Such states are California, Connecticut, Illinois, and New York. See Appendix A for detailed descriptions of each piece of legislation.

¹⁴⁸ See Appendix B.

¹⁴⁹ Unlawful Trial Offers, N.Y. GEN. BUS. LAW § 396-mm(1)(b) (Consol. through 2017 Chs. 1–402).

¹⁵⁰ *Id.* § 396-mm(3).

the auto-renewing subscription service—including the ability to cancel the subscription—and notice regarding any material changes thereto.¹⁵¹ Notice is also required prior to the renewal of the subscription itself.¹⁵²

Under CAPRS, which serves as a model for many state statutes as well as ROSCA, an online service must provide “an acknowledgement that includes the automatic renewal or continuous service offer terms, cancellation policy, and information regarding how to cancel in a manner that is capable of being retained by the consumer.”¹⁵³ The law specifically addresses the issue of automatic renewal coupled with free trials, stating: “If the offer includes a free trial, the business shall also disclose in the acknowledgement how to cancel and allow the consumer to cancel before the consumer pays for the goods or services.”¹⁵⁴ The law adds that such requirement may be fulfilled after completion of the initial order.¹⁵⁵ Hence, following the initial registration to the service, online service providers should furnish users with an easy-to-read written acknowledgement that explains the terms of the automatic renewing service, the cancellation policy, and how to cancel one’s subscription.¹⁵⁶ If the offer contains a free trial, the acknowledgement should also explain the fact that the user may cancel the subscription before being charged with subsequent payments for the renewed term and any goods or services.¹⁵⁷ The acknowledgment should be “in a manner that is capable of being retained by the [user]”¹⁵⁸—e.g., in line with common practice—through an email sent to the user upon registration with a link to the terms of service section of the online service’s website.

CAPRS imposed another obligation on online services: “A business making automatic renewal or continuous service offers shall provide a toll-free telephone number, electronic mail address,

¹⁵¹ See *infra* text accompanying notes 153–58.

¹⁵² See *infra* text accompanying notes 172–77.

¹⁵³ CAL. BUS. & PROF. CODE § 17602(a)(3) (Deering 2009).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* § 17602(d)(1).

¹⁵⁶ See *id.* § 17602(a)(3).

¹⁵⁷ See *id.*

¹⁵⁸ *Id.* § 17602(c).

a postal address only when the seller directly bills the consumer, or another cost-effective, timely, and easy-to-use mechanism for cancellation that shall be described in the acknowledgment”¹⁵⁹ ROSCA includes a similar general requirement, under which online services that include a negative option feature must “provide[] simple mechanisms for a [user] to [cease any] recurring charges.”¹⁶⁰ Hence, online service providers should implement a mechanism for cancelling the subscription, such as a toll-free number or a designated email address, and describe such mechanism in the acknowledgment sent to users. “[A]nother cost-effective, timely, and easy-to-use mechanism” many online services use is an in-service feature to deactivate one’s account and cancel his or her subscription.¹⁶¹

Also, the online service should bring to the user’s attention any material change to the terms of the user’s subscription or the automatic renewal feature. The online service should “provide the [user] with a clear and conspicuous notice” explaining “the material change, and provide information [on] how to cancel [the subscription] in a manner that” the user can retain, before such material change takes effect.¹⁶² Therefore, an online service should send its users notice via email or in-service notifications, with respect to the forthcoming material change in its terms, and allow for sufficient time to cancel one’s subscription prior to the implementation of such change.

Lastly, users should receive a notice of renewal prior to the auto-renewal itself, according to which the user will incur charges and the subscription will be renewed, unless canceled (e.g., thirty days’ notice before the cancellation deadline).¹⁶³ Such notices are sent to remind users that their subscription is about to renew for an

¹⁵⁹ *Id.* § 17602(b).

¹⁶⁰ 15 U.S.C. § 8403(3) (2012).

¹⁶¹ BUS. & PROF. § 17602(b). As previously mentioned, Amazon and HelloFresh offer such in-services features to a questionable degree of ease. *See supra* notes 37–42.

¹⁶² BUS. & PROF. § 17602(c), (d)(2).

¹⁶³ Such a requirement appears in the laws of Florida, Hawaii, Illinois, Montana, New York, Rhode Island, South Carolina, South Dakota, Utah, and Wisconsin. *See Appendix B* (providing detailed descriptions of each piece of legislation and its applicability to different types of contracts).

additional term, and provide them with enough time to cancel if they do not wish to renew the subscription.¹⁶⁴ Some state statutes regulate the process by which users receive this advance reminder, and dictate a minimal time period to send the notice before the right to cancel expires and the subscription can automatically renew.¹⁶⁵ Some statutes even require that certain content appear in notices, and regulate its means of delivery.¹⁶⁶ An email sent by the online service to the user's designated email account or an in-service notification should satisfy this notice requirement, provided that *adequate time is given to users to cancel the subscription*.¹⁶⁷

¹⁶⁴ See Appendix B.

¹⁶⁵ Such a requirement appears in the laws of Arkansas, Georgia, Hawaii, Illinois, Kentucky, Montana, New York, Ohio, Rhode Island, South Dakota, Utah, and Wisconsin. See Appendix B.

¹⁶⁶ See Appendix B. Specifically, New York law imposes certain requirements on “service, maintenance or repair [contracts] for any real or personal property” (which may include certain contracts entered between users and online service providers). See N.Y. GEN. OBLIG. LAW § 5-903(2) (Consol. through 2017 Chs. 1–402). Its stated purpose is to “call[] the attention of [the user] to the existence of” an automatic renewal provision in the user agreement or terms of service. See *id.* Under the New York statute, an online service that includes an automatic renewal feature must provide its users with a “written notice” of such automatic renewal, “served personally or by certified mail,” at least fifteen days, but not more than thirty days, prior thereto. See *id.* Otherwise, the auto-renewal provision will be deemed unenforceable. See *id.*; see also *Ovitz v. Bloomberg L.P.*, 967 N.E.2d 1170, 1173–74 (N.Y. 2012) (showing defendant conceded that its automatic renewal provision clause was rendered unenforceable due to lack of notice and, therefore, waived its claims to termination fees under the agreement).

¹⁶⁷ It should be noted that additional obligations with respect to written notice may be born on an online service that collects billing information and charges users directly, rather than use a third-party vendor (e.g., PayPal). An online service that periodically charges its users' bank accounts under an automatic renewal plan is subject to the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693–1693r (2012), and the Electronic Fund Transfers (Regulation E), 12 C.F.R. § 205.10(d) (2017), which regulate preauthorized electronic fund transfers. Primarily, if a recurring payment “var[ies] in amount from the previous” preauthorized transfer, the online service provider, as “the designated payee or the financial institution” of the user, should notify him or her by “written notice of the amount and date of the transfer at least [ten] days before the scheduled date of [such] transfer. 12 C.F.R. § 205.10(d)(1); see also 15 U.S.C. § 1693e(b).

V. BEST PRACTICES AND CONCLUSION

As in many other industries, online services have long employed free trial offers to lure new users, as well as agreements with automatic renewal clauses to perpetuate recurring revenue. Yet the rising trend of coupling automatic subscription renewals with free trials into one tempting bundle has raised concerns with respect to unfair and deceptive trade practices. Accordingly, federal and state legislatures have acted to regulate such practice by setting a number of conditions for advertising joint offers as “Free” and for automatically renewing a user’s subscription once the trial period lapses. These statutory developments enabled public enforcement efforts by the FTC and state attorneys general, as well as private consumer class actions, which claimed violations of federal and state statutes.

Under this legal framework, online services that offer goods or services through a free trial followed by an automatic renewal must be aware of their obligations under federal and state law to avoid costly litigation with harsh results (i.e., the goods may be considered an unconditional gift to the user and the service will be forced to refund any service fees charged). The following best practices should allow online service to retain a business model that pairs free trials with an auto-renewing subscription, while adhering to the requirements under current law:

A. Consent

1. For the sake of obtaining the user’s informed consent, make sure to distinguish the trial period, provided free of charge, from the subsequent subscription terms, when offering a user the opportunity to try the service for free. Do not impose any charges on the user during the free trial period, or impose any costs associated with the free trial through subsequent payments.
2. Obtain unambiguous affirmative consent from the user for any automatic charge or renewal before any such charges are made to the user’s debit or credit card on a recurring basis. For example, an acknowledgement that the user has read and agreed to the automatic payment terms and cancellation policy, expressed by checking a box stating “I agree” during the sign-

up process or by providing a signature during registration (i.e., an opt-in option).

B. Clear and Conspicuous Disclosure

1. Clearly and conspicuously disclose that while the trial itself is free, the user also subscribed to subsequent payments for the service. Such disclosure must be located near the free trial offer, and must easily refer the user to all the terms and conditions of the offer. For example, clearly indicate that the subscription will auto-renew at the end of the free trial, and add a link under the free trial offer that refers the user to the service's terms of use webpage.
2. Provide clear and conspicuous disclosure of the terms of the offer before the registration is completed, including details on the auto-renewal feature and the user's ability to cancel the subscription, and avoid charges before the end of the trial period. More specifically, the service must disclose:
 - (1) That the subscription will . . . continue until the [user] cancels[;]
 - (2) [t]he description of the cancellation policy that applies to the offer[;]
 - (3) [t]he recurring charges that will be charged to the [user]'s credit or debit card or payment account with a third party as part of the automatic renewal plan . . . [;]
 - (4) [t]he length of the automatic renewal term or that the service is continuous, unless [canceled] by the [user; and]
 - (5) [t]he minimum purchase obligation, if any.¹⁶⁸

The terms should be in close visual proximity to the request for consent (i.e., where the user signs or submits his or her authorization). For example, services should add such wording to the registration process—specifically, near the final sign-up or submit button—before the user agrees to financial undertakings. Such wording may refer to a more comprehensive description of the automatic renewal feature in the terms of use of the online service, but make sure to clearly

¹⁶⁸ CAL. BUS. & PROF. CODE § 17601(b)(5).

convey, stated alone, that the user’s subscription will automatically renew at the end of the free trial period and that additional charges will apply.

3. Note that some state statutes dictate the size, design, and location of such disclosure compared to the surrounding text, and mandate that the disclosure clearly attract attention to its language.¹⁶⁹ Typically, such requirements with respect to the written disclosure are as follows: “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.”¹⁷⁰ “In the case of an audio disclosure,” CAPRS specifies that “‘clear and conspicuous’ . . . means in a volume and cadence sufficient to be readily audible and understandable.”¹⁷¹

C. Notice

1. Following registration, “provide an acknowledgement . . . capable of being retained by the [user]” that contains the subscription and “offer terms, cancellation policy, and . . . [instructions on] how to cancel” before being charged.¹⁷² For example, following his or her subscription to the service, send an email to the user’s designated email address that includes a link to the terms of use of the online service, where the renewal terms are laid out.
2. Provide a cancellation mechanism, such as “a toll-free telephone number, [email] address” or any other “cost-effective, timely, and easy-to-use [option] for cancellation” of the subscription.¹⁷³ For example, offer an easy-to-use in-service feature to deactivate one’s account and cancel his or her subscription.

¹⁶⁹ Most notably, CAL. BUS. & PROF. CODE § 17602(a)(1) and statutes modeled after CAPRS.

¹⁷⁰ CAL. BUS. & PROF. CODE § 17601(c).

¹⁷¹ *Id.*

¹⁷² *Id.* § 17602(a)(3).

¹⁷³ *Id.* § 17602(b); OR. REV. STAT. § 646A.295 (2015).

3. Provide prompt notice regarding any material changes to terms of service governing the subscription and its automatic renewal, and allow the user a timely opportunity to cancel his or her subscription prior to the changes taking effect. For example, send an email or use in-service notifications that a user must review and check at the bottom to acknowledge that changes that will take effect thirty days from such notice.
4. Provide the user with a timely reminder of upcoming renewals prior to charging subsequent fees for the subscription period following the free trial. Notice should clearly and conspicuously disclose how to cancel the subscription, and allow the user to do so prior to the end of the initial free trial period. For example, an email sent by the online service provider to the user's designated email account or an in-service notification, thirty days before processing the automatic renewal (or less, depending on the length of the free trial period), would likely satisfy the requirement.

Online services that use auto-renewing subscription models coupled with free trials should review their business practices and consider complying with the above guidelines.¹⁷⁴ Under CAPRS, a

¹⁷⁴ LinkedIn is a noteworthy example of an online service that seems to comply with most of the above requirements of consent, disclosure, and notice. The LinkedIn Premium Career service fails to mention in its initially shown promotion that the free trial of the service includes an automatic renewal feature. See *LinkedIn Premium*, LINKEDIN, <https://members.linkedin.com/premiumcareer> [<https://perma.cc/UTW6-VMFU>] (last visited Nov. 13, 2017). A reference is only made to one's ability to cancel anytime at the bottom of the page, below the fold. See *id.* However, after choosing to start a premium career subscription, the offer clearly and conspicuously states that the monthly and annual billing cycles provide for a “[one]-month free trial then \$29.99 / month” and a “[one]-month free trial then \$24.99 / month (\$299.88 annually),” respectively. *Premium Career Subscription*, LINKEDIN, https://www.linkedin.com/payments/purchase?_cartId=3490300434&optionCartId=3490300444&isNewChooser=true&destRedirectURL=http%3A%2F%2Fwww%2Elinkedin%2Ecom%2Ffeed%2F%3FshowPremiumWelcomeBanner%3Dtrue&chsId=7zk7niqFQrWEUPZbsB%2BKJQ%3D%3D&trk=&trkInfo=orderId%3A3490300434%2CoptionCartId%3A3490300444 (last visited Nov. 13, 2017). When selecting one of these billing cycles a notice appears which states “Your free trial begins on [trial start date] and will end on [trial end date]. You can cancel anytime before [trial end later date] to avoid being charged and we’ll send an email reminder [seven] days before the trial ends.” *Id.* When asked to provide a payment method, a user may hover their cursor over the “Why do I need this for a free trial?” link to inquire why he or she must provide such information. See *id.* An additional notice provides: “Don’t worry, you

good faith effort to comply with the law acts as an exception to the rule and may very well exempt an online service from civil liability.¹⁷⁵ By adhering to federal and state law and documenting such compliance efforts, online services have a stronger argument

won't be charged until your free trial ends. We ask for your payment information to provide a seamless subscription experience. You can cancel anytime before [trial end date] to avoid being charged, and we'll send you an email reminder [seven] days before your free trial ends." *Id.* Once the user provides a payment method, he or she may review the order which states "*The plan will automatically renew each month until cancelled. To avoid charges for the next month, cancel before the renewal date.*" *Id.* At the bottom of the registration page, LinkedIn also includes the following frequently asked questions:

Will I be charged during my free trial? No, you won't be charged during your free trial, which begins on [trial start date] and ends on [trial end date]. You can cancel anytime before [trial end date] to avoid being charged; How can I cancel during my free trial? Once you're signed up, a link to cancel will appear on your Settings page. Learn more about how to cancel on our Help Center; What happens after the free trial period? If you do not cancel before your free trial period ends on [trial end date], you will be automatically charged for your subscription.

Id. Once a user starts the free trial, he or she are provided with an invoice that states: "You'll pay . . . once your free trial ends on [trial end date] until you cancel," along with a link that allows for easy cancellation. *Secure Checkout*, LINKEDIN, https://www.linkedin.com/payments/receipt/3490363454?chsId=e83BGgXnRw6nsVztDQ4MNQ%3D%3D&firstTime=true&imDoneURL=http%3A%2F%2Fwww.linkedin.com%2Ffeed%2F%3FshowPremiumWelcomeBanner%3Dtrue&isJellyBelly=true&subsPlanType=job_seeker (last visited Nov. 13, 2017). One's ability to cancel his or her subscription is easily visible on the user's account page under the tab "Manage Premium account." *See My Premium*, LINKEDIN, <https://www.linkedin.com/premium/my-premium/?manage=true> (last visited Nov. 13, 2017). An email notification is sent to any user that confirms his or her decision to cancel the subscription, during the free trial period. Such users also continue to have access to premium features until the end of the free trial period. *See We Hope You Enjoyed LinkedIn Premium!*, LINKEDIN, <https://www.linkedin.com/premium/cancel/complete> (last visited Nov. 13, 2017) ("You will continue to have access to your Premium features until the end of your current billing cycle . . .").

¹⁷⁵ *See* BUS. & PROF. § 17604(b). Other state laws such as Illinois, Louisiana, North Carolina, and Florida, have included a similar exemptions, whereby non-compliance with the law will not be deemed a violation if the business:

demonstrates all of the following: (1) It has established and implemented written procedures to comply with the requirements [under the law] and enforces compliance with [such] procedures[;]
 (2) [a]ny failure to comply . . . [was] the result of an error[; and]
 (3) . . . as a matter of routine business practice, [it] provides a full refund or credit for all amounts billed to or paid by the [user]

due to such error. LA. STAT. ANN. § 9:2716(C). *See also* Appendix B for a detailed description of each piece of legislation.

to assert such defense and dismiss users' claims against them, who maintain that while they hoped to formulate their opinion of the service by the end of the trial, they were actually required to make up their mind and agree to be charged when they signed up for the trial. Such best practices help establish the strong defense, based on a good faith exception, that users freely exercised their informed judgment, despite that they are required to opt-out by the end of the trial rather than opt-in.¹⁷⁶

By following the requirements of consent, disclosure, and notice outlined in this Article, an online service will likely ensure that courts, the FTC, state attorneys general, and even users will not view its practice of coupling automatic subscription renewals with free trial offers as an unfair or deceptive business practice. This will reduce users' complaints and minimize any significant legal concerns.¹⁷⁷

¹⁷⁶ Additional ways to limit liability or minimize exposure to class claims which are highly recommended yet are outside the scope of this Article include adding mandatory arbitration provisions and class action waivers in the terms of use of the online service. *See, e.g.*, Christina Davis, *Spotify Billing Class Action Lawsuit Will Go to Arbitration*, TOP CLASS ACTIONS (May 2, 2014), <https://topclassactions.com/lawsuit-settlements/lawsuit-news/25748-spotify-billing-class-action-lawsuit-will-go-arbitration/> [<https://perma.cc/29L3-H74T>]. In addition, some businesses may be exempt from the requirements pertaining to auto-renewals if they are regulated by other federal bodies. *See, e.g.*, BUS. & PROF. § 17605(c).

¹⁷⁷ Note that the scope of this Article is limited to legislation focused specifically on free trials and automatic renewal. The business practice examined in this Article may qualify as unlawful, unfair, and fraudulent under additional federal and state laws, which are outside such scope. CAPRS explicitly states that "all available civil remedies that apply to a violation of this article may be employed." BUS. & PROF. § 17604. In fact, it is common practice that cases brought against online services by private parties or enforcement agencies with respect to automatic renewals also include claims under other acts and statutes such as the FTC Act, 15 U.S.C. §§ 41–58 (2012), the Mailing of Unordered Merchandise Act, 39 U.S.C. § 3009 (2012), the Electronic Funds Transfer Act, 15 U.S.C. §§ 1693–1693r (2012), and state consumer protection and unfair competition laws or state deceptive acts and practices statutes. *See, e.g.*, *Roz v. Nestle Waters N. Am., Inc.*, No. 2:16cv-04418-SVW-JEM, 2017 U.S. Dist. LEXIS 5177, at *1–2 (C.D. Cal. Jan. 11, 2017) (order granting in part and denying in part defendant's motion to dismiss); *Mayron v. Google, Inc.*, No. 1-15-CV-275940, 2016 Cal. Super. LEXIS 173, at *9 (Santa Clara Cnty. Feb. 26, 2016) (order after hearing); *Kruger v. Kiwi Crate*, No. 1-13-CV-254550, 2015 Cal. Super. LEXIS 447, at *2 (Santa Clara Cnty. July 2, 2015) (order granting final approval of class action settlement) (plaintiffs filed suits under CAPRS as well as such other federal and state laws).

APPENDIX A: STATE LAWS REGARDING FREE TRIALS

As of Mar. 18, 2017

ALABAMA
<i>Applicable laws:</i> None.
ALASKA
<p><i>Applicable laws:</i> ALASKA STAT. § 45.45.920 (2016).</p> <p><i>Consent:</i> ALASKA STAT. § 45.45.920(c): “Before providing goods or services to a consumer for a free trial period, a seller shall obtain express verifiable consent from the consumer to the free trial period.”</p> <p><i>Disclosure:</i> ALASKA STAT. § 45.45.920(b): “When offering, promoting, or advertising consumer goods or services for a free trial period, a seller shall clearly and conspicuously disclose all material terms and conditions of the free trial period, including (1) all material restrictions, limitations, terms, and conditions of the free trial period, including any obligation by the consumer to purchase a minimum quantity of goods or services after the free trial period ends; (2) a description of all charges that will be imposed after the free trial period ends, including whether billing will include charges for shipping and handling and, if the offer, promotion, or advertising is made by telephone, the amount of the shipping and handling charges; (3) a description of the consumer’s right to cancel; and (4) any other obligations the consumer assumes by accepting or using the goods or services during the free trial period.”</p> <p><i>Notice:</i> None.</p> <p><i>Other:</i> ALASKA STAT. § 45.45.920(f): “[D]oes not apply to . . . (2) a pre-notification negative option plan[s] that [are] regulated by . . . and . . . compl[y] with 16 C.F.R. Part 425.”</p>
ARIZONA
<i>Applicable laws:</i> None.

ARKANSAS	
<i>Applicable laws:</i>	None.
CALIFORNIA	
<i>Applicable laws:</i>	CAL. BUS. & PROF. CODE § 17537 (Deering 1986); CAL. BUS. & PROF. CODE § 17602 (Deering 2009).
<i>Consent:</i>	CAL. BUS. & PROF. CODE § 17537(c): “It is unlawful to notify any person by any means that he or she will receive a gift and that as a condition of receiving the gift he or she must pay any money, or purchase or lease (including rent) any goods or services, if any one or more of the following conditions exist: . . . (4) The majority of the gift offeror’s sales or leases within the preceding year, through the marketing channel in which the gift is offered or through in-person sales at retail outlets, of the type of goods or services which must be purchased or leased in order to obtain the gift item was made in conjunction with the offer of a gift.”
<i>Disclosure:</i>	None.
<i>Notice:</i>	CAL. BUS. & PROF. CODE §17602(a)(3): “If the offer includes a free trial, the business shall also disclose in the acknowledgment how to cancel and allow the consumer to cancel before the consumer pays for the goods or services.”
<i>Other:</i>	None.
COLORADO	
<i>Applicable laws:</i>	None.
CONNECTICUT	
<i>Applicable laws:</i>	CONN. GEN. STAT. § 42-126b (2017); CONN. AGENCIES REGS. § 42-110b-19 (2015).
<i>Consent:</i>	CONN. GEN. STAT. §42-126b(a): “No person . . . shall . . . offer for sale goods, wares or merchandise, where the offer includes the voluntary and unsolicited sending of goods, wares or merchandise not actually ordered or requested by the recipient, either orally or in writing.”

Disclosure: CONN. GEN. STAT. §42-126b(b): “The provisions of this subsection shall not apply to . . . (4) any introductory rate where the rate paid by the consumer after the end of the introductory rate period has been clearly and conspicuously disclosed to the consumer in the contract.”

Notice: CONN. AGENCIES REGS. § 42-110b-19: “It shall be an unfair or deceptive act or practice to: (a) Advertise any merchandise or service as free by the use of the word ‘free’ or any other terms of similar import when the merchandise or service is not, in fact, free (see subsection (d) of this section). Failure to disclose any and all terms, conditions and obligations required of the consumer shall be a violation of sections 42-110b-1 to 42-110b-31, inclusive, of the Regulations of Connecticut State Agencies

(b): Any person . . . that sells or offers to sell any products or services used primarily for personal, family or household purposes pursuant to a trial offer or at an introductory rate that will change at the end of the introductory rate period, shall provide the recipient of such products or services with clear and conspicuous written notice that the recipient may cancel such products or services upon the expiration of such trial offer or introductory rate period. Such notice shall include the procedure for such cancellation and shall be provided with any written promotional material for such products or services furnished to the recipient before the start of the trial offer or the introductory rate period or with the initial delivery of such products or services to the recipient.”

Other: CONN. GEN. STAT. §42-126b(a): “[U]nsolicited goods . . . shall . . . be deemed an unconditional gift”

CONN. GEN. STAT. §42-126b(b): Does “not apply to . . . (2) . . . negative option plan[s] . . . governed by 16 C.F.R. Part 425”

DELAWARE

Applicable laws: None.

FLORIDA	
<i>Applicable laws:</i>	FLA. STAT. § 817.415 (2017).
<i>Consent:</i>	None.
<i>Disclosure:</i>	FLA. STAT. § 817.415(1)(b): “It is the intent of the Legislature to prevent such deception by requiring disclosure of all contingent conditions, obligations, or considerations in any form in connection with the advertising of goods or services using the term ‘free’ or words of similar meaning and intent.” FLA. STAT. § 817.415(4): “Any item or portion of an item unconditionally offered as ‘free’ shall in fact be free, without obligation or requirement of consideration in any form, when accepted in writing within the time limit set forth in the advertisement or within a reasonable time, if no time limit is so set.”
<i>Notice:</i>	None.
<i>Other:</i>	None.
GEORGIA	
<i>Applicable laws:</i>	None.
HAWAII	
<i>Applicable laws:</i>	HAW. CODE R. § 16-303-5 (LexisNexis 2017).
<i>Consent:</i>	None.
<i>Disclosure:</i>	HAW. CODE R. § 16-303-5(c): “When using the word ‘free’ in advertisements, all the terms, conditions, and obligations upon which receipt and retention of the ‘free’ merchandise are contingent shall be set forth clearly and conspicuously. In the case of oral statements or representations, such terms, conditions, and obligations shall be stated orally at the outset of the offer of ‘free’ merchandise. In the case of written statements or representations, such terms, conditions, and obligations shall appear next to the offer of ‘free’ merchandise. Disclosure of the terms of the offer set forth in a footnote of an advertisement to which reference is made by an asterisk or other symbol placed next to the offer shall not

<p>constitute adequate disclosure. A notice of the existence of an offer of ‘free’ merchandise on packaged merchandise shall not be regulated by this section provided that the notice is not otherwise unfair or deceptive.”</p> <p><i>Notice:</i> None.</p> <p><i>Other:</i> None.</p>
IDAHO
<i>Applicable laws:</i> None.
ILLINOIS
<p><i>Applicable laws:</i> Consumer Fraud and Deceptive Business Practices Act, 815 ILL. COMP. STAT. ANN. 505 / 2P.1 (West, Westlaw through P.A. 100-573).</p> <p><i>Consent:</i> None.</p> <p><i>Disclosure:</i> None.</p> <p><i>Notice:</i> 815 ILL. COMP. STAT. ANN. 505 / 2P.1(b): “A person or entity that, by means of a telemarketing plan, program, or campaign, offers free goods or services to an Illinois consumer on a trial basis and assesses a periodic fee or charge for the goods or services after the end of the free trial period must send to the consumer who accepts the free goods or services an invoice that the consumer may use to pay the periodic fee or charge or indicate that the consumer no longer wishes to receive the goods or services after the end of the free trial period. The invoice must contain an address and telephone number the consumer may use to cancel the goods or services if the consumer no longer wishes to receive the free goods or services after the end of the free trial period.”</p> <p><i>Other:</i> Statute applies to telemarketing. See 815 ILL. COMP. STAT. ANN. 505 / 2P.1.</p>
INDIANA
<i>Applicable laws:</i> None.

IOWA
<i>Applicable laws:</i> None.
KANSAS
<i>Applicable laws:</i> None.
KENTUCKY
<i>Applicable laws:</i> None.
LOUISIANA
<i>Applicable laws:</i> None.
MAINE
<p><i>Applicable laws:</i> ME. REV. STAT. ANN. tit. 10, § 1210 (2017).</p> <p><i>Consent:</i> ME. REV. STAT. ANN. tit. 10, § 1210(2): “A seller may not make a free offer to a consumer in the State unless, at the time the consumer agrees to the free offer.”</p> <p><i>Disclosure:</i> ME. REV. STAT. ANN. tit. 10, § 1210(2): “A seller may not make a free offer to a consumer in the State unless, at the time the consumer agrees to the free offer: A. The seller obtains directly from the consumer information necessary for billing the consumer; and B. The seller provides the consumer with clear and conspicuous information regarding the terms of the free offer, including any additional financial obligations that may be incurred as a result of accepting the free offer.”</p> <p><i>Notice:</i> None.</p> <p><i>Other:</i> The Act assumes, in its definition of “free offer,” that by accepting a free offer, a “consumer [will be] required to contact the seller to avoid incurring a financial obligation for receiving additional products or services.” <i>See</i> ME. REV. ANN. STAT. tit. 10, § 1210(1)(B).</p>
MARYLAND
<i>Applicable laws:</i> None.
MASSACHUSETTS
<i>Applicable laws:</i> None.

MICHIGAN	
<i>Applicable laws:</i>	Consumer Protection Act, MICH. COMP. LAWS § 445.903 (2017).
<i>Consent:</i>	None.
<i>Disclosure:</i>	MICH. COMP. LAWS § 445.903(1): “Unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful and are defined as follows: . . . (r) Representing that a consumer will receive goods or services ‘free’ or ‘without charge[,]’ or using words of similar import in the representation, without clearly and conspicuously disclosing with equal prominence in immediate conjunction with the use of those words the conditions, terms, or prerequisites to the use or retention of the goods or services advertised.”
<i>Notice:</i>	None.
<i>Other:</i>	None.
MINNESOTA	
<i>Applicable laws:</i>	MINN. STAT. § 82A.09 (2017).
<i>Consent:</i>	None.
<i>Disclosure:</i>	MINN. STAT. § 82A.09, subdiv. 3: “The following devices or sales presentations, and the use of those devices or presentations, are deceptive or misleading practices: (1) An advertisement that offers travel, accommodations, gifts, meals, or entertainment published to induce prospective purchasers to visit a campground or attend a sales presentation and that . . . (iii) contains the words ‘free’ or ‘no obligation’ or similar terms unless the offer is unequivocally without conditions”
<i>Notice:</i>	None.
<i>Other:</i>	Statute applies to membership camping contracts only. See MINN. STAT. § 82A.09, subdiv. 2.
MISSISSIPPI	
<i>Applicable laws:</i>	None.

MISSOURI
<i>Applicable laws:</i> None.
MONTANA
<i>Applicable laws:</i> None.
NEBRASKA
<i>Applicable laws:</i> None.
NEVADA
<i>Applicable laws:</i> None.
NEW HAMPSHIRE
<i>Applicable laws:</i> None.
NEW JERSEY
<i>Applicable laws:</i> None.
NEW MEXICO
<i>Applicable laws:</i> None.
NEW YORK
<p><i>Applicable laws:</i> N.Y.C., N.Y., Rules of the City of New York tit. 6, § 5-06 (2018); N.Y GEN. BUS. LAW § 396-mm (Laws through 2017 Chapters 1–402).</p> <p><i>Consent:</i> N.Y GEN. BUS. LAW § 396-mm(1)(a): “No additional products or services or enrollment in any membership, for a fee, shall be provided until the express consent of the consumer has been obtained.”</p> <p><i>Disclosure:</i> 6 R.C.N.Y. § 5-06(b): “A seller who imposes a condition on a free offer must describe the condition clearly and conspicuously. The description of every condition on a free offer must be placed near the word ‘free.’ An asterisk or other symbol near the word ‘free,’ which refers the customer to a footnote containing conditions, does not satisfy this section. This condition must be in print at least half as large as the print used for the word ‘free.’”</p>

N.Y GEN. BUS. LAW § 396-mm(1)(a): “It shall be unlawful for a person, partnership, firm, association, corporation or agent or employee thereof to provide a free trial offer unless the material terms of the offer are clearly and conspicuously disclosed.”

Notice: N.Y GEN. BUS. LAW § 396-mm(1)(b): “At least fifteen, but not more than thirty days before a consumer is required to cancel a free trial, the person, partnership, firm, association, corporation or agent or employee thereof shall send to the consumer the terms of the offer and the deadline to cancel; provided, however, that where a free trial offer ends in less than thirty days, the terms of the offer and the deadline to cancel shall be sent at least seven days before a consumer is required to cancel the free trial. Such notice is not required when the free trial is a magazine or newspaper subscription and at any time cancellation occurs the consumer shall receive a refund for issues not mailed; provided, however, that such refund option is disclosed with the free trial subscription offer.”

Other: 6 R.C.N.Y. § 5-06 applies only to the City of New York.

N.Y GEN. BUS. LAW § 396-mm: “(2) This section shall not apply to a negative option plan regulated by the federal trade commission pursuant to Code of Federal Regulations, title 16, part 425; and does not apply to other contractual plans or arrangements such as continuity plans, subscription arrangements, standing order arrangements, supplements and series arrangements, under which the seller provides similar special interest goods or services to a consumer who has consented in advance to receive the goods or services on a periodic basis with no binding commitment period and no minimum purchase amount. (3) This section shall not apply to any purchase when the person, partnership, firm, association, corporation or agent or employee thereof does not debit or charge any consumer account and sends the consumer an invoice requesting payment which includes information about how to cancel a free trial.”

NORTH CAROLINA
<i>Applicable laws:</i> None.
NORTH DAKOTA
<i>Applicable laws:</i> None.
OHIO
<p><i>Applicable laws:</i> OHIO ADMIN. CODE 109:4-3-04 (2017).</p> <p><i>Consent:</i> None.</p> <p><i>Disclosure:</i> OHIO ADMIN. CODE 109:4-3-04(C): “When using the word ‘free’ in a consumer transaction, all the terms, conditions, and obligations upon which receipt and retention of the ‘free’ goods or services are contingent shall be set forth clearly and conspicuously at the outset of the offer. Terms, conditions, and obligations of the offer must be printed in a type size half as large as the word ‘free,’ and all of the terms, conditions, and obligations should appear in close proximity with the offer of ‘free’ goods or services. Disclosure of the terms of the offer set forth in a footnote of an advertisement to which reference is made by an asterisk or other symbol placed next to the offer is not regarded as making disclosure at the outset.”</p> <p><i>Notice:</i> None.</p> <p><i>Other:</i> None.</p>
OKLAHOMA
<i>Applicable laws:</i> None.
OREGON
<p><i>Applicable laws:</i> OR. ADMIN. R. 137-020-0015 (2017); OR. REV. STAT. § 646.644 (2015).</p> <p><i>Consent:</i> OR. REV. STAT. § 646.644: “(3) A person may not cause a consumer to incur a financial obligation as a result of accepting a free offer unless: (a) The person obtains the consumer’s billing information directly from the consumer; or (b) The consumer gives affirmative consent at the time the consumer accepts a free offer for the</p>

person to provide billing information to a person other than the person making a free offer. For purposes of this subsection, a person obtains a consumer's billing information directly from the consumer if it is obtained by the person or by the person's agent or employee.

(4) A person may not impose a financial obligation on a consumer as a result of the consumer's acceptance of a free offer unless the consumer's affirmative consent to the terms of the free offer as set forth in subsection (2) of this section is obtained."

Disclosure: OR. REV. STAT. § 646.644(2): "A person may not make a free offer to a consumer, or impose a financial obligation on the consumer as a result of the consumer's acceptance of a free offer, unless the person provides the consumer with clear and conspicuous information regarding the terms of the free offer before the consumer agrees to accept the free offer, including at a minimum:

(a) Identification of all goods or services, or enrollments in a membership, subscription or service contract, that the consumer will receive or incur a financial obligation for as a result of accepting the free offer;

(b) The cost to the consumer of any financial obligation the consumer will incur if the consumer accepts the free offer, including any fees or charges;

(c) Any requirement, if applicable, that the consumer take affirmative action to reject the free offer and instructions about how the consumer is to indicate the consumer's rejection of the free offer;

(d) A statement, if applicable, that by accepting the free offer, the consumer will become obligated for additional goods or services, or enrollment in a membership, subscription or service contract, unless the consumer takes affirmative action to cancel the free offer or otherwise reject receipt of the additional goods or services or the enrollment in a membership, subscription or service contract;

(e) Except as provided in paragraph (h) of this subsection, the consumer's right to cancel the free offer using

procedures specifically identified for that purpose that, at a minimum, enable the consumer to cancel by calling a toll-free telephone number or to cancel in a manner substantially similar to that by which the consumer accepted the free offer;

(f) The time period during which the consumer must cancel in order to avoid incurring a financial obligation as a result of accepting the free offer;

(g) If applicable, the consumer's right to receive a credit on goods or services received as a result of accepting the free offer when the goods or services are returned or rejected, and the time period during which the goods or services must be returned or rejected for the purpose of receiving a credit; and

(h) With respect to a free offer that is for a publication, including but not limited to a magazine, newspaper or other periodical, a statement that the consumer will receive information regarding the consumer's right to cancel the free offer and an explanation of the procedure to cancel the free offer at the time the consumer receives an invoice to pay for the publication, including but not limited to written notice of cancellation by mail to the person providing the free offer."

OR. ADMIN. R. § 137-020-0015: "(2) Unfair or Deceptive Use of 'Free' Offers: A person engages in conduct which is unfair or deceptive in trade or commerce . . . (e) When a person makes a free offer in conjunction with the purchase or lease of real estate, goods or services, which is subject to any terms, conditions or limitations in order to accept or use the 'free' offer, and the person fails: (A) To clearly and conspicuously display in an advertisement of the 'free' offer all material terms, conditions, and limitations of accepting the 'free' offer; (B) To clearly and conspicuously disclose to the consumer all terms, conditions, and limitations of accepting the 'free' offer prior to consummating any transaction; and (C) To afford the consumer a meaningful opportunity to reject the offer."

<i>Notice:</i> None.
<i>Other:</i> None.
PENNSYLVANIA
<i>Applicable laws:</i> None.
RHODE ISLAND
<i>Applicable laws:</i> None.
SOUTH CAROLINA
<i>Applicable laws:</i> None.
SOUTH DAKOTA
<i>Applicable laws:</i> None.
TENNESSEE
<i>Applicable laws:</i> None.
TEXAS
<i>Applicable laws:</i> None.
UTAH
<p><i>Applicable laws:</i> UTAH ADMIN. CODE r. 152-11-4 (2017).</p> <p><i>Consent:</i> None.</p> <p><i>Disclosure:</i> UTAH ADMIN. CODE r. 152-11-4: “(A) It shall be a deceptive act or practice in connection with a consumer transaction for a supplier to use the word ‘free’ or other words of similar import or meaning, except when such representation is, in fact, the case and the cost of the ‘free’ consumer commodity is not passed on to the consumer by raising the regular price of the consumer commodity that must be purchased in connection with the ‘free’ offer. . . .</p> <p>(D) No ‘free’ offers should be made in connection with the introduction of a new consumer commodity offered for sale at a specified price unless the offerer expects in good faith to discontinue the offer after a limited time and to commence selling the consumer commodity promoted separately, at the same price at which it was promoted with a ‘free’ offer.”</p>

<p><i>Notice:</i> None.</p> <p><i>Other:</i> None.</p>
VERMONT
<i>Applicable laws:</i> None.
VIRGINIA
<i>Applicable laws:</i> None.
WASHINGTON
<i>Applicable laws:</i> None.
WEST VIRGINIA
<i>Applicable laws:</i> None.
WISCONSIN
<p><i>Applicable laws:</i> WIS. ADMIN. CODE ATCP § 127-14 (2017).</p> <p><i>Consent:</i> WIS. ADMIN. CODE ATCP § 127-14: “No seller may do any of the following, directly or by implication, in a telephone transaction: . . . (8) Misrepresent that a seller is offering consumer goods or services free of charge or at a reduced price.”</p> <p><i>Disclosure:</i> WIS. ADMIN. CODE ATCP § 127-14: “No seller may do any of the following, directly or by implication, in a telephone transaction: . . . (14) Fail to disclose, in connection with every purported offer of free goods or services in a telephone transaction, any costs which the consumer must incur and any conditions which the consumer must meet in order to receive those free goods or services.”</p> <p><i>Notice:</i> None.</p> <p><i>Other:</i> Statute applies to telemarketing. <i>See</i> WIS. ADMIN. CODE ATCP § 127-14.</p>
WYOMING
<i>Applicable laws:</i> None.

APPENDIX B: STATE LAWS REGARDING AUTOMATIC RENEWAL
As of Mar. 18, 2017

ALABAMA
<i>Applicable laws:</i> None.
ALASKA
<p><i>Applicable laws:</i> ALASKA STAT. § 45.45.930 (2016).</p> <p><i>Consent:</i> ALASKA STAT. § 45.45.930(b): “Before using an opt-out marketing plan, a seller shall obtain express verifiable consent from the buyer that confirms that the buyer agrees to the use of the plan.”</p> <p><i>Disclosure:</i> ALASKA STAT. § 45.45.930: “(b) The seller shall provide the following information before obtaining the consent: (1) a description of the material terms and conditions of the plan, including a description of the goods or services that will be offered; (2) that the buyer’s account will be charged unless the buyer takes an affirmative action to avoid the charge; (3) the date the charge will be submitted for payment; and (4) the specific steps the buyer must take to avoid the charge.</p> <p>(c) A seller who charges a buyer for goods or services under an opt-out marketing plan has the burden of proving that the buyer provided the express verifiable consent required by (b) of this section and was given the disclosures required by (b) of this section.”</p> <p><i>Notice:</i> None.</p> <p><i>Other:</i> ALASKA STAT. § 45.45.930(e)(1)(B): “[D]oes not include prenotification negative option plan[s] that [are] regulated by and compl[y] with 16 C.F.R. Part 425.”</p>
ARIZONA
<i>Applicable laws:</i> None.

ARKANSAS

Applicable laws: ARK. CODE ANN. §§ 4-86-106, 4-86-109 (2017).

Consent: ARK. CODE ANN. § 4-86-106: “(a) Except as provided in subsection (c) of this section, no professional home security services contract that is entered into after August 1, 2003, shall state that the term of the professional home security services contract will automatically be renewed for any additional period beyond the initial term of the professional home security services contract.

(b) Except as provided in subsection (c) of this section, no professional home security services contract under subsection (a) of this section shall be renewed for any additional period beyond the initial term of the professional home security services contract unless the person receiving the professional home security services affirmatively notifies the person offering the professional home security services that he or she wishes to renew the professional home security services contract.”

Disclosure: ARK. CODE ANN. § 4-86-106(c): “(1) A provider of professional home security services and a person may enter into a professional home security services contract that has a fixed initial term and successive, automatic monthly renewal terms.

(2) If the professional home security services contract contains a renewal clause as described in subdivision (c)(1) of this section, then: (A) The professional home security services contract shall conspicuously state that the person receiving the professional home security services has the right without additional cost or penalty to terminate the professional home security services contract at the end of the initial term or the then current renewal”

Notice: ARK. CODE ANN. § 4-86-106(c)(1)(B): “The person shall provide the provider of the professional home security services with notice of his or her intent to terminate by written notice at least thirty (30) days before the

<p>expiration of the initial term or the then current renewal term.”</p> <p>ARK. CODE ANN. § 4-86-109(b): “[A] lessor of personal property under a written lease agreement that contains an automatic lease renewal shall provide to a lessee: (1) Written notice of the automatic renewal at least thirty (30) days before the date the cancellation of the renewal of the lease agreement is due by the lessee; (2) The identification of the lessor on communications between the lessee and lessor, including monthly statements; (3) A copy of the original lease agreement on request; and (4) The full purchase price, the interest rate for the lease, the monthly payment, and the total payoff amount for the personal property in the written lease agreement.”</p> <p><i>Other:</i> ARK. CODE ANN. § 4-86-106 applies to alarm systems contracts only.</p> <p>ARK. CODE ANN. § 4-86-109 applies to lease of personal property only.</p>
<p>CALIFORNIA</p>
<p><i>Applicable laws:</i> CAL. BUS. & PROF. CODE §§ 17600–17606 (Deering 2009).</p> <p><i>Consent:</i> CAL. BUS. & PROF. CODE § 17602(a): “It shall be unlawful for any business making an automatic renewal or continuous service offer to a consumer in this state to do any of the following: . . . (2) Charge the consumer’s credit or debit card or the consumer’s account with a third party for an automatic renewal or continuous service without first obtaining the consumer’s affirmative consent to the agreement containing the automatic renewal offer terms or continuous service offer terms.”</p> <p><i>Disclosure:</i> CAL. BUS. & PROF. CODE § 17602(a): “It shall be unlawful for any business making an automatic renewal or continuous service offer to a consumer in this state to do any of the following: (1) Fail to present the automatic renewal offer terms or continuous service offer terms in a clear and conspicuous manner before the subscription or purchasing agreement is fulfilled and in visual proximity,</p>

or in the case of an offer conveyed by voice, in temporal proximity, to the request for consent to the offer.”

Notice: CAL. BUS. & PROF. CODE § 17602: “(a) It shall be unlawful for any business making an automatic renewal or continuous service offer to a consumer in this state to do any of the following: . . . (3) Fail to provide an acknowledgment that includes the automatic renewal or continuous service offer terms, cancellation policy, and information regarding how to cancel in a manner that is capable of being retained by the consumer. If the offer includes a free trial, the business shall also disclose in the acknowledgment how to cancel and allow the consumer to cancel before the consumer pays for the goods or services.

(b) A business making automatic renewal or continuous service offers shall provide a toll-free telephone number, electronic mail address, a postal address only when the seller directly bills the consumer, or another cost-effective, timely, and easy-to-use mechanism for cancellation that shall be described in the acknowledgment specified in paragraph (3) of subdivision (a).

(c) In the case of a material change in the terms of the automatic renewal or continuous service offer that has been accepted by a consumer in this state, the business shall provide the consumer with a clear and conspicuous notice of the material change and provide information regarding how to cancel in a manner that is capable of being retained by the consumer.”

Other: CAL. BUS. & PROF. CODE § 17603: “In any case in which a business sends any goods, wares, merchandise, or products to a consumer, under a continuous service agreement or automatic renewal of a purchase, without first obtaining the consumer’s affirmative consent as described in Section 17602, the goods, wares, merchandise, or products shall for all purposes be deemed an unconditional gift to the consumer, who may use or dispose of the same in any manner he or she sees

<p>fit without any obligation whatsoever on the consumer’s part to the business, including, but not limited to, bearing the cost of, or responsibility for, shipping any goods, wares, merchandise, or products to the business.”</p>
<p>COLORADO</p>
<p><i>Applicable laws:</i> COLO. REV. STAT. §§ 6-6-101–6-6-103 (2017).</p> <p><i>Consent:</i> COLO. REV. STAT. § 6-6-101(1): “‘Unsolicited goods’ means contractual obligations or other tangible or intangible property or services delivered to a person who has not ordered, solicited, or agreed to purchase them, but shall not include tangible or intangible goods or services which are misdirected, misdelivered, or offered in good faith in substitution for goods solicited by the recipient.”</p> <p>COLO. REV. STAT. § 6-6-103(1): “No sender of any unsolicited goods shall mail or otherwise send to any recipient of such unsolicited goods a bill for such unsolicited goods or any dunning communications.”</p> <p><i>Disclosure:</i> None.</p> <p><i>Notice:</i> None.</p> <p><i>Other:</i> Statute only applies to publishers of magazines or other periodicals. <i>See</i> COLO. REV. STAT. § 6-6-103(2)(a)–(c).</p> <p>Unsolicited goods shall be deemed a gift to the recipient. <i>See</i> COLO. REV. STAT. § 6-6-102(2).</p>
<p>CONNECTICUT</p>
<p><i>Applicable laws:</i> CONN. GEN. STAT. § 42-126b (2017).</p> <p><i>Consent:</i> CONN. GEN. STAT. § 42-126b(a): “No person . . . shall . . . offer for sale goods, wares or merchandise, where the offer includes the voluntary and unsolicited sending of goods, wares or merchandise not actually ordered or requested by the recipient, either orally or in writing.”</p> <p><i>Disclosure:</i> CONN. GEN. STAT. § 42-126b(b): “The provisions of this subsection shall not apply to . . . (4) any introductory rate where the rate paid by the consumer after the end of the introductory rate period has been clearly and conspicuously disclosed to the consumer in the contract.”</p>

CONN. GEN. STAT. § 42-126b(b): “Any person . . . that sells or offers to sell any products or services used primarily for personal, family or household purposes pursuant to a trial offer or at an introductory rate that will change at the end of the introductory rate period, shall provide the recipient of such products or services with clear and conspicuous written notice that the recipient may cancel such products or services upon the expiration of such trial offer or introductory rate period. Such notice shall include the procedure for such cancellation and shall be provided with any written promotional material for such products or services furnished to the recipient before the start of the trial offer or the introductory rate period or with the initial delivery of such products or services to the recipient.”

Other: CONN. GEN. STAT. § 42-126b(c)(2): “Any person, firm, partnership, association or corporation that sells or offers to sell any products or services used primarily for personal, family or household purposes for a specified period of time of one hundred eighty days or less pursuant to a written contract that contains a provision for automatic renewal of the contract for a period of time of more than thirty-one days at the end of the period of time specified in the contract, shall include in such contract a clear and conspicuous written notice that the recipient of such products or services may cancel such contract and the procedure for such cancellation, provided the recipient shall not be required to exercise such right of cancellation more than sixty days prior to the expiration of the specified period of time.”

CONN. GEN. STAT. § 42-126b(a): “[U]nsolicited goods . . . shall . . . be deemed an unconditional gift”

Statute does not apply to “negative option plan[s] that [are] governed by 16 CFR. Part 425” CONN. GEN. STAT. § 42-126b(b)(2).

DELAWARE
<i>Applicable laws:</i> None.
FLORIDA
<p><i>Applicable laws:</i> FLA. STAT. § 501.165 (2017).</p> <p><i>Consent:</i> None.</p> <p><i>Disclosure:</i> FLA. STAT. § 501.165(2)(a): “Any seller that sells, leases, or offers to sell or lease any service to a consumer pursuant to a service contract that has an automatic renewal provision, unless the consumer cancels that contract, shall disclose the automatic renewal provision clearly and conspicuously in the contract or contract offer.”</p> <p><i>Notice:</i> FLA. STAT. § 501.165(2)(b): “Any seller that sells or offers to sell any service to a consumer pursuant to a service contract the term of which is a specified period of [twelve] months or more and that automatically renews for a specified period of more than [one] month, unless the consumer cancels the contract, shall provide the consumer with written or electronic notification of the automatic renewal provision. Notification shall be provided to the consumer no less than [thirty] days or no more than [sixty] days before the cancellation deadline pursuant to the automatic renewal provision. Such notification shall disclose clearly and conspicuously: (1) That unless the consumer cancels the contract the contract will automatically renew. (2) Methods by which the consumer may obtain details of the automatic renewal provision and cancellation procedure, whether by contacting the seller at a specified telephone number or address, by referring to the contract, or by any other method.”</p> <p><i>Other:</i> FLA. STAT. § 501.165(c): “A seller that fails to comply with the requirements of this subsection is in violation of this subsection unless the seller demonstrates that: (1) As part of the seller’s routine business practice, the seller has established and implemented written procedures to</p>

comply with this section and enforces compliance with the procedures; (2) Any failure to comply with this subsection is the result of error; and (3) As part of the seller's routine business practice, where an error has caused the failure to comply with this subsection, the unearned portion of the contract subject to the automatic renewal provision is refunded as of the date on which the seller is notified of the error."

GEORGIA

Applicable laws: GA. CODE ANN. §§ 13-12-2-3, 13-12-5 (2017).

Consent: None.

Disclosure: GA. CODE ANN. § 13-12-2: "Any seller that sells, leases, or offers to sell or lease any service to a consumer pursuant to a service contract that has an automatic renewal provision shall disclose the automatic renewal provision clearly and conspicuously in the contract or contract offer."

Notice: GA. CODE ANN. § 13-12-3: "Any seller that sells, leases, or offers to sell or lease any service to a consumer pursuant to a service contract for a specified period of [twelve] months or more and that automatically renews for a specified period of more than one month, unless the consumer cancels the contract, shall provide the consumer with written or electronic notification of the automatic renewal provision. Notification shall be provided to the consumer no less than [thirty] days or no more than [sixty] days before the cancellation deadline pursuant to the automatic renewal provision. Such notification shall disclose clearly and conspicuously: (1) That unless the consumer cancels the contract, the contract will automatically renew; and (2) The methods by which the consumer may obtain details of the automatic renewal provision and cancellation procedure, including contacting the seller at a specified telephone number or address, referring to the contract, or any other method."

<p><i>Other:</i> GA. CODE ANN. § 13-12-5: “A violation of this chapter renders the automatic renewal provision of a contract void and unenforceable.”</p> <p>The term Automatic renewal provision only applies to a provision under which a service contract is “renew[ed] for a specified period of more than one month” if the renewal causes the service contract to be in effect more than six months after the day of the initiation of the service contract. <i>See</i> GA. CODE ANN. § 13-12-3.</p>
<p>HAWAII</p>
<p><i>Applicable laws:</i> HAW. REV. STAT. § 481-9.5 (2017).</p> <p><i>Consent:</i> None.</p> <p><i>Disclosure:</i> HAW. REV. STAT. § 481-9.5(a): “Any person who sells or offers to sell any products or services to a consumer pursuant to a consumer contract that has a specified term of more than one month and an automatic renewal clause under which the contract will automatically renew for a specified term of more than one month unless the consumer cancels the contract, shall disclose the automatic renewal clause and the procedure by which the consumer can cancel automatic renewal of the consumer contract clearly and conspicuously in the consumer contract.”</p> <p>HAW. REV. STAT. § 481-9.5(k): “For purposes of this section . . . ‘Clearly and conspicuously’ means in larger type than the surrounding text; 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 the case of an audio disclosure, ‘clear and conspicuous’ and ‘clearly and conspicuously’ mean in a volume and cadence sufficient to be readily audible and understandable.”</p> <p><i>Notice:</i> HAW. REV. STAT. § 481-9.5(b): “Any person who sells or offers to sell any products or services to a consumer pursuant to a consumer contract that has a specified</p>

<p>contract term of twelve months or more, under which the contract will automatically renew for a specified term of more than one month unless the consumer cancels the consumer contract, shall notify the consumer clearly and conspicuously: (1) That the consumer contract will automatically renew unless the consumer cancels the contract; (2) How to cancel the contract; and (3) The deadline by which the consumer shall respond to cancel the consumer contract and prevent automatic renewal. The notice provided to the consumer under this subsection shall be sent to the consumer no less than thirty days and no more than sixty days before the date upon which the consumer shall respond under paragraph (3).”</p> <p><i>Other:</i> Under certain conditions described in the act, “[t]he notice to the consumer . . . may be provided electronically . . .” HAW. REV. STAT. § 481-9.5(c).</p>
IDAHO
<p><i>Applicable laws:</i> None.</p>
ILLINOIS
<p><i>Applicable laws:</i> Automatic Contract Renewal Act, 815 ILL. COMP. STAT. ANN. 601 / 10 (West, Westlaw through P.A. 100-575).</p> <p><i>Consent:</i> None.</p> <p><i>Disclosure:</i> 815 ILL. COMP. STAT. ANN. 601 / 10(a): “Any person, firm, partnership, association, or corporation that sells or offers to sell any products or services to a consumer pursuant to a contract, where such contract automatically renews unless the consumer cancels the contract, shall disclose the automatic renewal clause clearly and conspicuously in the contract, including the cancellation procedure.”</p> <p><i>Notice:</i> 815 ILL. COMP. STAT. ANN. 601 / 10(b): “Any person, firm, partnership, association, or corporation that sells or offers to sell any products or services to a consumer pursuant to a contract, where such contract term is a specified term of [twelve] months or more, and where</p>

such contract automatically renews for a specified term of more than one month unless the consumer cancels the contract, shall notify the consumer in writing of the automatic renewal. Written notice shall be provided to the consumer no less than [thirty] days and no more than [sixty] days before the cancellation deadline pursuant to the automatic renewal clause. Such written notice shall disclose clearly and conspicuously: (i) that unless the consumer cancels the contract it will automatically renew; and (ii) where the consumer can obtain details of the automatic renewal provision and cancellation procedure (for example, by contacting the business at a specified telephone number or address or by referring to the contract).”

Other: 815 ILL. COMP. STAT. 601 / 10(c): “A person, firm, partnership, association, or corporation will not be liable for a violation of this Act or the Consumer Fraud and Deceptive Business Practices Act if such person, firm, partnership, association, or corporation demonstrates that, as part of its routine business practice: (i) it has established and implemented written procedures to comply with this Act and enforces compliance with the procedures; (ii) any failure to comply with this Act is the result of error; and (iii) where an error has caused a failure to comply with this Act, it provides a full refund or credit for all amounts billed to or paid by the consumer from the date of the renewal until the date of the termination of the account, or the date of the subsequent notice of renewal, whichever occurs first.”

INDIANA

Applicable laws: None.

IOWA

Applicable laws: IOWA CODE § 552.8 (2017).

Consent: None.

Disclosure: IOWA CODE § 552.8: “A physical exercise club contract shall not contain an automatic renewal clause.”

<p><i>Notice:</i> None.</p> <p><i>Other:</i> Statute applies to health club memberships only. See IOWA CODE § 552.8.</p>
KANSAS
<i>Applicable laws:</i> None.
KENTUCKY
<p><i>Applicable laws:</i> KY. REV. STAT. ANN. § 367.580 (West 2017).</p> <p><i>Consent:</i> None.</p> <p><i>Disclosure:</i> KY. REV. STAT. ANN. § 367.580(1): “In connection with the use of any negative option plan, promotional material shall clearly and conspicuously disclose the material terms of the plan, including:</p> <ul style="list-style-type: none"> (a) That aspect of the plan under which the subscriber must notify the seller, in the manner provided for by the seller, if he does not wish to purchase the selection; (b) Any obligation assumed by the subscriber to purchase a minimum quantity of merchandise; (c) The right of a contract-complete subscriber to cancel his membership at any time; (d) Whether billing charges will include an amount for postage and handling; (e) A disclosure indicating that the subscriber will be provided with at least ten (10) days in which to mail any form, contained in or accompanying an announcement identifying the selection, to the seller; (f) A disclosure that the seller will credit the return of any selections sent to a subscriber, and guarantee to the postal service or the subscriber postage to return such selections to the seller when the announcement and form are not received by the subscriber in time to afford him at least ten (10) days in which to mail his form to the seller; (g) The frequency with which the announcements and forms will be sent to the subscriber, and the maximum number of announcements and forms which will be sent to him during a [twelve] month period.” <p><i>Notice:</i> KY. REV. STAT. ANN. § 367.580: “(2) In connection with</p>

the use of any negative option plan, prior to sending any selection, the seller shall mail to its subscribers, within the time specified by subsection (3) of this section: (a) An announcement identifying the selection; (b) A form, contained in or accompanying the announcement, clearly and conspicuously disclosing that the subscriber will receive the selection identified in the announcement unless he instructs the seller that he does not want the selection, designating a procedure by which the form may be used for the purpose of enabling the subscriber so to instruct the seller, and specifying either the return date or the mailing date.

(3) The seller shall mail the announcement and form either at least twenty (20) days prior to the return date or at least fifteen (15) days prior to the mailing date, or provide a mailing date at least ten (10) days after receipt by the subscriber, provided, however, that whichever system the seller chooses for mailing the announcement and form, such system must provide the subscriber with at least ten (10) days in which to mail his form.”

Other: Statute applies to negative option plans. *See* KY. REV. STAT. ANN. § 367.580(2).

LOUISIANA

Applicable laws: LA. STAT. ANN. § 9:2716 (2017).

Consent: None.

Disclosure: LA. STAT. ANN. § 9:2716(A): “Any person, firm, or corporation engaged in commerce that sells, leases, or offers to sell or lease, any products or services to a consumer pursuant to a contract, when the contract automatically renews unless the consumer cancels the contract, shall disclose the automatic renewal clause clearly and conspicuously in the contract or contract offer.”

Notice: LA. STAT. ANN. § 9:2716(B): “Any person, firm, or corporation engaged in commerce that sells, leases, or offers to sell or lease, any products or services to a consumer pursuant to a contract, when the contract

<p>automatically renews unless the consumer cancels the contract, shall disclose clearly and conspicuously how to cancel the contract in the initial contract, contract offer, or with delivery of products or services.”</p> <p><i>Other:</i> LA. STAT. ANN. § 9:2716(E): “Any contract automatically renewed in violation of this Section shall revert to a thirty day renewal contract in accordance with the same terms.”</p> <p>LA. STAT. ANN. § 9:2716(C): “A person, firm, or corporation that fails to comply with the requirements of this Section is in violation of this Section unless the person, firm, or corporation demonstrates all of the following: (1) It has established and implemented written procedures to comply with this Section and enforces compliance with the procedures. (2) Any failure to comply with this Section is the result of error. (3) When an error has caused the failure to comply with this Section, it, as a matter of routine business practice, provides a full refund or credit for all amounts billed to or paid by the consumer from the date of the renewal until the date of the termination of the contract, or the date of the subsequent notice of renewal, whichever occurs first.”</p>
MAINE
<i>Applicable laws:</i> None.
MARYLAND
<p><i>Applicable laws:</i> MD. CODE ANN., COM. LAW § 14-12B-06 (LexisNexis 2017).</p> <p><i>Consent:</i> None.</p> <p><i>Disclosure:</i> MD. CODE ANN., COM. LAW § 14-12B-06(b): “(3) Each contract for health club services shall conspicuously disclose under the heading ‘Notice of Consumer Rights’</p> <p>(4) Each contract for the sale of health club services shall contain in a form acceptable to the Division: (i) A clear and conspicuous itemized description of any fees and charges”</p>

<p><i>Notice:</i> None.</p> <p><i>Other:</i> Statute applies to health club memberships only. <i>See</i> MD. CODE ANN., COM. LAW § 14-12B-06.</p>
<p>MASSACHUSETTS</p>
<p><i>Applicable laws:</i> None.</p>
<p>MICHIGAN</p>
<p><i>Applicable laws:</i> None.</p>
<p>MINNESOTA</p>
<p><i>Applicable laws:</i> None.</p>
<p>MISSISSIPPI</p>
<p><i>Applicable laws:</i> None.</p>
<p>MISSOURI</p>
<p><i>Applicable laws:</i> MO. REV. STAT. § 407.675 (2017).</p> <p><i>Consent:</i> None.</p> <p><i>Disclosure:</i> MO. REV. STAT. § 407.675: “No contract shall be valid for a term longer than twenty-four months from the date upon which the contract is signed. However, a club may allow a member to convert his contract into a contract for a period longer than twenty-four months after the member has been a member of the club for a period of at least six months. The duration of the contract shall be clearly and conspicuously disclosed in the contract in boldface type of a minimum size of [fourteen] points. No contract shall contain an automatic renewal clause; provided, however, that such an agreement may provide for the buyer to exercise a renewal.”</p> <p><i>Notice:</i> None.</p> <p><i>Other:</i> Statute applies to buyers’ club contracts only. <i>See</i> MO. REV. STAT. § 407.675.</p>

MONTANA	
<i>Applicable laws:</i>	MONT. ADMIN. R. 38.5.6004 (2017).
<i>Consent:</i>	None.
<i>Disclosure:</i>	None.
<i>Notice:</i>	<p>MONT. ADMIN. R. 38.5.6004: “(9) At least [sixty] days prior to the expiration date of the customer’s service contract, the supplier must provide written notice to the customer of either: (a) the existence and operation of an automatic renewal provision present in the customer’s contract; or (b) the need for the customer to affirmatively renew to retain service from the supplier at the end of the contract term.</p> <p>(10) If the service contract contains an automatic renewal provision, the supplier may not change the terms and conditions of the contract upon the renewal date unless the customer has been provided with written notice of the changes at least [sixty] days in advance of their effective date and of his or her right to change suppliers rather than renew the contract. With the written notice of contract changes, the supplier must provide the customer a letter of authorization approving the contract changes to return to the supplier. Without a signed letter of authorization, the supplier may not renew the contract.”</p>
<i>Other:</i>	Statute applies to electric and natural gas utility contracts. See MONT. ADMIN. R. 38.5.6004.
NEBRASKA	
<i>Applicable laws:</i>	NEB. REV. STAT. § 63-101 (2009).
<i>Consent:</i>	NEB. REV. STAT. § 63-101: “No person in this state shall be compelled to pay for any newspaper, magazine or other publication which shall be mailed or sent to him without his having subscribed for or ordered it, or which shall be mailed or sent to him after the time of his subscription or order therefore has expired, notwithstanding that he may have received it.”
<i>Disclosure:</i>	None.
<i>Notice:</i>	None.

<i>Other:</i> Statute applies to newspapers, magazines and periodicals only. <i>See</i> NEB. REV. STAT. § 63-101.
NEVADA
<i>Applicable laws:</i> None.
NEW HAMPSHIRE
<i>Applicable laws:</i> N.H. REV. STAT. ANN. § 358-I:5 (2017). <i>Consent:</i> N.H. REV. STAT. ANN. § 358-I:5(I): “No term contract for health club services shall be for a term of more than one year, nor shall any health club term contract contain an automatic renewal clause for a period greater than one month. A contract may provide for a renewal option for continued membership, but any such renewal must be accepted in writing by a buyer and is effective only upon payment of the renewal price. Under no circumstances may a contract for health club services be renewed more than [ninety] days before the contract’s expiration date.” <i>Disclosure:</i> None. <i>Notice:</i> None. <i>Other:</i> Statute applies to health club memberships only. <i>See</i> N.H. REV. STAT. ANN. § 358-I:5.
NEW JERSEY
<i>Applicable laws:</i> None.
NEW MEXICO
<i>Applicable laws:</i> None.
NEW YORK
<i>Applicable laws:</i> N.Y. COMP. CODES R. & REGS. tit. 21, § 4603.1 (2017); N.Y. GEN. OBLIG. LAW § 5-903 (McKinney 2017). <i>Consent:</i> N.Y. COMP. CODES R. & REGS. tit. 21, § 4603.1(d): “Prior to the purchase of any good or service, telemarketers shall disclose to the customer the cost of the goods or services that are the subject of the call and if the offer includes a negative option feature, all material terms and conditions of the negative option feature, including, but not limited to the fact that the customer’s account will be

charged unless the customer takes an affirmative action to avoid the charges, the dates the charges will be submitted for payment, and the specific steps the customer must take to avoid the charge.”

Disclosure: None.

Notice: N.Y. GEN. OBLIG. LAW § 5-903(2): “No provision of a contract for service, maintenance or repair to or for any real or personal property which states that the term of the contract shall be deemed renewed for a specified additional period unless the person receiving the service, maintenance or repair gives notice to the person furnishing such contract service, maintenance or repair of his intention to terminate the contract at the expiration of such term, shall be enforceable against the person receiving the service, maintenance or repair, unless the person furnishing the service, maintenance or repair, at least fifteen days and not more than thirty days previous to the time specified for serving such notice upon him, shall give to the person receiving the service, maintenance or repair written notice, served personally or by certified mail, calling the attention of that person to the existence of such provision in the contract.”

Other: N.Y. COMP. CODES R. & REGS. tit. 21, § 4603.1 applies to telemarketing only.

N.Y. GEN. OBLIG. LAW § 5-903 applies to service, maintenance or repair contract for real or personal property only. *See* N.Y. Gen. Oblig. Law § 5-903.

NORTH CAROLINA

Applicable laws: N.C. GEN. STAT. § 75-41 (2016).

Consent: None.

Disclosure: N.C. GEN. STAT. § 75-41(a): “Any person engaged in commerce that sells, leases, or offers to sell or lease, any products or services to a consumer pursuant to a contract, where the contract automatically renews unless the consumer cancels the contract, shall do all of the following: (1) Disclose the automatic renewal clause

clearly and conspicuously in the contract or contract offer. (2) Disclose clearly and conspicuously how to cancel the contract in the initial contract, contract offer, or with delivery of products or services . . . (4) 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.”

Notice: N.C. GEN. STAT. § 75-41(a)(3): “Any person engaged in commerce that sells, leases, or offers to sell or lease, any products or services to a consumer pursuant to a contract, where the contract automatically renews unless the consumer cancels the contract, shall do all of the following: . . . (3) For any automatic renewal exceeding [sixty] days, provide written notice to the consumer by personal delivery, electronic mail, or first-class mail, at least [fifteen] days but no earlier than [forty-five] days before the date the contract is to be automatically renewed, stating the date on which the contract is scheduled to automatically renew and notifying the consumer that the contract will automatically renew unless it is cancelled by the consumer prior to that date.”

Other: N.C. GEN. STAT. § 75-41: (c) “A person that fails to comply with the requirements of this section is in violation of this section unless the person demonstrates that all of the following are its routine business practice: (1) The person has established and implemented written procedures to comply with this section and enforces compliance with the procedures. (2) Any failure to comply with this section is the result of error. (3) Where an error has caused the failure to comply with this section, the person provides a full refund or credit for all amounts billed to or paid by the consumer from the date of the renewal until the date of the termination of the contract, or the date of the subsequent notice of renewal, whichever occurs first.”

(e): “A violation of this section renders the automatic renewal clause void and unenforceable.”

NORTH DAKOTA
<i>Applicable laws:</i> None.
OHIO
<p><i>Applicable laws:</i> OHIO ADMIN. CODE 4901:1-29-10 (2017).</p> <p><i>Consent:</i> None.</p> <p><i>Disclosure:</i> None.</p> <p><i>Notice:</i> OHIO ADMIN. CODE 4901:1-29-10(G): “Contract renewals. (1) The provisions of this paragraph apply to all residential and small commercial contracts that contain automatic renewal clauses, except those which renew on a month-to-month basis.</p> <p>(2) For contracts that contain an early termination or cancellation option with no fee for early termination or cancellation, upon renewal, the retail natural gas supplier or opt-in governmental aggregator shall, in a separate notice, notify customers of such expiration at least forty-five calendar days, but not more than ninety calendar days, in advance of the contract expiration date. Such notice shall accurately describe or highlight any changes and state that the customer contract will renew at the specified rate unless the customer affirmatively cancels the contract. Such notices must clearly and accurately describe the manner in which the customer may cancel the contract and the time during which the customer must act to cancel the contract. (a) The notice shall be made by separate mailing (envelope or postcard), the front cover of which shall state: ‘Important notice regarding your electric service contract.’ (b) The notice shall, at a minimum, state any renewal period and how the customer may terminate, renew, and/or extend the contract. (c) The renewal period for contracts with renewal provisions shall not exceed the initial contract period.”</p> <p><i>Other:</i> Statute applies to electric and natural gas utility contracts. See OHIO ADMIN. CODE 4901:1-29-10.</p>

OKLAHOMA	
<i>Applicable laws:</i>	None.
OREGON	
<i>Applicable laws:</i>	OR. REV. STAT. § 646A.295 (2017).
<i>Consent:</i>	OR. REV. STAT. § 646A.295(1): “It is unlawful for a person that makes an automatic renewal or continuous service offer to a consumer in this state to do any of the following . . . (b) Charge the consumer’s credit or debit card or payment account with a third party for an automatic renewal or continuous service without first obtaining the consumer’s affirmative consent to the agreement containing the automatic renewal offer terms or continuous service offer terms.”
<i>Disclosure:</i>	OR. REV. STAT. § 646A.295(1): “It is unlawful for a person that makes an automatic renewal or continuous service offer to a consumer in this state to do any of the following: (a) Fail to present the automatic renewal offer terms or continuous service offer terms in a clear and conspicuous manner before a subscription or purchasing agreement is fulfilled and in visual proximity, or in the case of an offer conveyed by voice, in temporal proximity, to the request for consent to the offer.”
<i>Notice:</i>	OR. REV. STAT. § 646A.295(1): “It is unlawful for a person that makes an automatic renewal or continuous service offer to a consumer in this state to do any of the following . . . (c) Fail to provide an acknowledgment that includes the automatic renewal offer terms or continuous service offer terms and information regarding how to cancel in a manner that is capable of being retained by the consumer. If the offer includes a free trial, the person shall also disclose in the acknowledgment how to cancel and allow the consumer to cancel before the consumer pays for the goods or services.”
	OR. REV. STAT. § 646A.295: “(2) A person making automatic renewal or continuous service offers shall provide a toll-free telephone number, electronic mail

<p>address, a post-office address only when the person directly bills the consumer, or another cost-effective, timely and easy-to-use mechanism for cancellation that must be described in the acknowledgment required by subsection (1)(c) of this section.</p> <p>(3) In the case of a material change in the terms of the automatic renewal or continuous service offer that has been accepted by a consumer, the person shall provide the consumer with a clear and conspicuous notice of the material change and provide information regarding how to cancel in a manner that is capable of being retained by the consumer.”</p> <p><i>Other:</i> None.</p>
PENNSYLVANIA
<i>Applicable laws:</i> None.
RHODE ISLAND
<p><i>Applicable laws:</i> 6 R.I. GEN. LAWS § 6-13-14 (2016).</p> <p><i>Consent:</i> None.</p> <p><i>Disclosure:</i> None.</p> <p><i>Notice:</i> 6 R.I. GEN. LAWS § 6-13-14(b): “[E]very lessor of personal property under a written lease containing an automatic lease renewal shall give written notice to the lessee not more than ninety (90) nor less than forty-five (45) days prior to the expiration of the lease term. The notice shall state the date upon which the lease term will expire and shall advise the lessee that the lease will be automatically renewed unless the lessee gives written notice to the contrary.”</p> <p><i>Other:</i> Statute applies to leases of personal property only. See 6 R.I. GEN. LAWS § 6-13-14.</p>
SOUTH CAROLINA
<p><i>Applicable laws:</i> S.C. CODE ANN. § 44-79-60 (2017).</p> <p><i>Consent:</i> None.</p> <p><i>Disclosure:</i> S.C. CODE ANN. § 44-79-60(4): “[P]rovide for an automatic renewal option, for a duration of no longer than</p>

<p>one month, which to be enforceable must be disclosed in bold type of at least fourteen-point font on the front page of the contract and must be initialed by the customer. The customer will be given the ability to opt-in to the automatic renewal provision at the time the initial contract is executed by initialing an opt-in provision.”</p> <p><i>Notice:</i> S.C. CODE ANN. § 44-79-60(4): “Near the expiration of the initial contract, the facility shall notify the customer in writing at the customer’s last known address of the automatic renewal option which the customer selected at the time the initial contract was executed.”</p> <p><i>Other:</i> Statute applies to health club memberships only. See S.C. CODE ANN. § 44-79-60.</p>
<p>SOUTH DAKOTA</p>
<p><i>Applicable laws:</i> S.D. CODIFIED LAWS § 49-31-116 (2017).</p> <p><i>Consent:</i> None.</p> <p><i>Disclosure:</i> None.</p> <p><i>Notice:</i> S.D. CODIFIED LAWS § 49-31-116: “Any telecommunications company having a contract with a subscriber for any retail telecommunications service that has a term of one year or more and that contains a provision requiring the subscriber to take any action to avoid automatic renewal of the contract for a renewal term greater than sixty days, shall give prior written notice to the subscriber of the action that the subscriber must take to avoid automatic renewal. The telecommunications company shall give notice to the subscriber not less than thirty and not more than sixty days before the date of the required action. The notice shall inform the subscriber in clear, plain and conspicuous language what action the subscriber must take to avoid renewal and the date by which the subscriber must take such action.”</p> <p><i>Other:</i> Statute applies to contracts with telecommunications companies only. See S.D. CODIFIED LAWS § 49-31-116.</p>

TENNESSEE	
<i>Applicable laws:</i>	TENN. CODE ANN. § 62-32-325 (2017); TENN. CODE ANN. § 47-18-505 (2017).
<i>Consent:</i>	None.
<i>Disclosure:</i>	TENN. CODE ANN. § 47-18-505: “No contract shall be valid for a term longer than eighteen (18) months from the date upon which the contract is signed. However, a club may allow a member to convert such member’s contract into a contract for a period longer than eighteen (18) months after the member has been a member of the club for a period of at least six (6) months. The duration of the contract shall be clearly and conspicuously disclosed in the contract in boldface type of a minimum size of fourteen (14) points. No contract shall contain an automatic renewal clause; provided, that such an agreement may provide for the buyer to exercise a renewal.” TENN. CODE ANN. § 62-32-325(a): “A contract having an automatic renewal clause between an alarm systems contractor and any homeowner or renter for the provision of alarm services may automatically be renewed for a period not to exceed one (1) year at a time. Any waiver of the renewal limitation period included in the contract shall be void as contrary to public policy.”
<i>Notice:</i>	None.
<i>Other:</i>	TENN. CODE ANN. § 47-18-505 applies to buyers’ clubs contracts only. <i>See</i> TENN. CODE ANN. § 47-18-505. TENN. CODE ANN. § 62-32-325 applies to alarm systems contracts only. <i>See</i> TENN. CODE ANN. § 62-32-325.
TEXAS	
<i>Applicable laws:</i>	None.
UTAH	
<i>Applicable laws:</i>	UTAH ADMIN. CODE r. 152-11-12 (2017); UTAH CODE ANN. § 15-10-201 (LexisNexis 2017).

<p><i>Consent:</i> UTAH ADMIN. CODE r. 152-11-12(A): “A negative option, as defined in 16 C.F.R. 425.1, is a deceptive act or practice only if the negative option violates 16 C.F.R. 425.1.”</p> <p><i>Disclosure:</i> None.</p> <p><i>Notice:</i> UTAH CODE ANN. § 15-10-201: “(1) Except as provided in Subsection (2)(b), a service contract may not contain an automatic renewal provision unless the seller provides the consumer written notice complying with Subsection (2) that informs the consumer of the automatic renewal provision.</p> <p>(2) (a) For a service contract executed on or after July 1, 2011, that exceeds [twelve] months for a renewal period, a seller shall provide written notice of an automatic renewal provision prominently displayed on the first page of the service contract. (b) In addition to complying with Subsection (2)(a), a seller shall provide written notice required under Subsection (1) to the consumer: (i) personally; (ii) by certified mail; or (iii) prominently displayed on the first page of a monthly statement. (c)(i) A seller shall provide written notice under Subsection (2)(b): (A) no later than [thirty] calendar days before the last day on which the consumer may give notice of the consumer’s intention to terminate the service contract; and (B) no sooner than [ninety] calendar days before the last day on which the consumer may give notice of the consumer’s intention to terminate the service contract. (ii) A seller may not provide written notice required under Subsection (1) except: (A) as provided in Subsection (2)(a); or (B) during the time period described in Subsection (2)(c)(i) . . . (d) Written notice required under Subsection (1) shall be: (i) written in clear and understandable language; and (ii) printed in an easy-to-read type size and style.”</p> <p><i>Other:</i> None.</p>
VERMONT
<i>Applicable laws:</i> None.

VIRGINIA
<i>Applicable laws:</i> None.
WASHINGTON
<i>Applicable laws:</i> None.
WEST VIRGINIA
<i>Applicable laws:</i> None.
WISCONSIN
<p><i>Applicable laws:</i> WIS. STAT. § 134.49 (2017).</p> <p><i>Consent:</i> None.</p> <p><i>Disclosure:</i> WIS. STAT. § 134.49(2): “(a) [I]f a business contract that is entered into, modified, or renewed after May 1, 2011, provides that the contract will be automatically renewed or extended for an additional period unless the customer declines renewal or extension, and the duration of the additional period is more than one month, the seller shall do one of the following: (1) At the time the customer enters into the contract, present to the customer a copy of a form including the disclosures required under par. (b) and obtain the customer’s signature on the form. (2) Include the disclosures required under par. (b) in the contract in a conspicuous manner and obtain the customer’s initials on the contract on a page on which a disclosure appears.</p> <p>(b) A disclosure required under par. (a) shall contain all of the following: (1) A statement that the contract will be renewed or extended unless the customer declines renewal or extension. (2) A statement indicating the duration of the additional contract period that would result from an automatic renewal or extension period. (3) A statement indicating whether an increase in charges to the customer will apply upon an automatic renewal or extension. (4) A description of action the customer must take to decline renewal or extension. (5) The date of the deadline for the customer to decline renewal or extension.”</p>

Notice: WIS. STAT. § 134.49: “(3) NOTICE REQUIRED. If a business contract that has an initial term of more than one year provides that the contract will be automatically renewed or extended for an additional term of more than one year, unless the customer declines renewal or extension, and the deadline for the customer to decline renewal or extension of the contract is more than [sixty] days after May 1, 2011, the provision is not enforceable against the customer and the contract will terminate at the end of the current contract term unless the seller provides to the customer, at least [fifteen] days but not more than [sixty] days before the deadline for the customer to decline renewal or extension, a written notice containing all of the following:

(a) A statement that the contract will be renewed or extended unless the customer declines renewal or extension.

(b) The deadline for the customer to decline renewal or extension.

(c) A description of any increase in charges to the customer that will apply after renewal or extension.

(d) A description of action that the customer must take to decline extension or renewal.

(4) MANNER OF GIVING NOTICE. A seller or a person acting on behalf of the seller shall give the written notice required under sub. (3) by any of the following methods:

(a) By mailing a copy of the notice by regular U.S. mail to the customer at the customer’s last-known business address, unless the contract requires the customer to notify the seller by certified mail of the customer’s intent to cancel.

(b) By mailing a copy of the notice by registered or certified mail to the customer at the customer’s last-known business address.

(c) By giving a copy of the notice personally to an owner, officer, director, or managing agent of the customer’s business.

(d) By including the notice on the first page of a monthly invoice sent to the customer. Notice under this paragraph shall be prominently displayed in bold face type and in a type size no smaller than 12-point.

(e) By sending a facsimile to the customer to the customer's last-known facsimile number, if the contract permits the customer to use this method to notify the seller that the customer declines renewal or extension of the contract.

(f) By sending an electronic mail message to the customer at the customer's last-known electronic mail address, if the contract permits the customer to use this method to notify the seller that the customer declines renewal or extension of the contract.

(g) By sending the notice via a recognized overnight courier service, if the contract permits the customer to use this method to notify the seller that the customer declines renewal or extension of the contract.”

Other: Applies to certain business-to-business contracts only.
See WIS. STAT. § 134.49.

WYOMING

Applicable laws: None.