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Canceling Difficult Cancellation: An Analysis of Recent Regulatory Efforts to Make Canceling Subscriptions Easier

Carter McCants

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CANCELING DIFFICULT CANCELLATION: AN ANALYSIS OF RECENT REGULATORY EFFORTS TO MAKE CANCELING SUBSCRIPTIONS EASIER

CARTER McCANTS*

ABSTRACT

The subscription-based economy is on the rise, and so are complaints of difficult cancellations. Companies utilize coercive and exploitative techniques, known as “dark patterns,” to trap consumers in subscription-based services. One notorious “dark pattern” is the “click-to-subscribe, call-to-cancel” scheme, whereby individuals can sign up online. But, when it comes time to cancel, many consumers often find themselves waiting on hold for hours.

In the interest of consumer welfare, subscription-based services should be as easy to cancel as they are to sign up for. Accordingly, this Note discusses the merits of recent crackdowns on cancellation barriers, including the Federal Trade Commission’s October 2021 policy enforcement statement. Ultimately, this Note advocates for increased federal and state regulation to protect consumers from harmful cancellation barriers.

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INTRODUCTION

On October 28, 2021, the Federal Trade Commission (FTC) set forth a new enforcement policy statement regarding subscription-based services.¹ The policy statement clarifies that under federal law businesses must “provide cancellation mechanisms that are at least as easy to use as the method the consumer used to buy the product or service in the first place.”² In other words, a consumer who signs up online must also have the option to cancel online.³

This groundbreaking policy is a step in the right direction, as many consumers today find themselves ensnared in manipulative, difficult-to-cancel subscriptions.⁴ In the interest of consumer

¹ *FTC to Ramp up Enforcement Against Illegal Dark Patterns that Trick or Trap Consumers into Subscriptions*, FTC (Oct. 29, 2021, 10:00 AM) [hereinafter *FTC Press Release*], <https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-ramp-enforcement-against-illegal-dark-patterns-trick-or-trap-consumers-subscriptions> [<https://perma.cc/5BUF-LYM6>]. The policy statement discusses predatory practices common with negative option marketing:

Negative option programs are widespread in the marketplace and can provide substantial benefits for sellers and consumers. At the same time, consumers suffer costs when marketers fail to make adequate disclosures, bill consumers without their consent, or make cancellation difficult or impossible. Over the years, unfair or deceptive negative option practices have remained a persistent source of consumer harm, often saddling shoppers with recurring payments for products and services they did not intend to purchase or did not want to continue to purchase.

FTC Enforcement Policy Statement Regarding Negative Option Marketing, 86 Fed. Reg. 60,822, 60,823 (Nov. 4, 2021) [hereinafter *FTC Enforcement Policy*]. Subscription-based services are a form of negative option-billing, whereby companies bill consumers on a recurring monthly or yearly basis. Evan Tarver, *Subscription Business Model*, INVESTOPEDIA (Mar. 25, 2022), <https://www.investopedia.com/ask/answers/042715/how-do-subscription-business-models-work.asp> [<https://perma.cc/QMY6-TFKM>]. Negative-option billing is defined as “the practice in which a business interprets a consumer’s silence or inaction as consent to charge them.” Yeganeh Torbati, *Federal Officials Look to Crack Down on Deceptive Subscription Marketing Practices at Broad Range of Firms*, WASH. POST (June 2, 2021, 7:01 AM), <https://www.washingtonpost.com/business/2021/06/02/automatic-renewals-ftc-subscriptions/> [<https://perma.cc/3VM5-X6AA>].

² *FTC Press Release*, *supra* note 1.

³ *See id.*

⁴ *See* David Lazarus, *Column: Canceling Subscriptions Shouldn’t Be Like Running an Obstacle Course*, L.A. TIMES (Oct. 27, 2020), <https://www.latimes>

protection, subscription services should be as effortless to cancel as they are to join.⁵

This Note discusses recent crackdowns on difficult cancellation and the need for increased regulation over the subscription-based economy.⁶ This Note also urges state legislatures to codify laws combatting predatory cancellation practices and allocate resources for increased enforcement.⁷ California is one of several states leading the way.⁸

Part I of this Note discusses the rise of subscription-based services in the United States.⁹ From Amazon Prime and Chewy to HelloFresh and BarkBox, subscription-based services are a rapidly growing sector of the U.S. economy and deserve careful examination.¹⁰

.com/business/story/2020-10-27/column-canceling-subscriptions [https://perma.cc/JE2F-5M2Z].

⁵ See *FTC Press Release*, *supra* note 1.

⁶ See *infra* Section III.A.

⁷ See *infra* Section III.B.

⁸ On October 4, 2021, Governor Gavin Newsom signed California Assembly Bill No. 390 into law. Christine Reilly, *Renewing Compliance with Automatic Renewal Laws*, JDSUPRA (Dec. 22, 2021), <https://www.jdsupra.com/legalnews/renewing-compliance-with-automatic-5732431/> [https://perma.cc/VPV5-V8CG]. This law bolsters consumer protections surrounding the ease of cancellation of subscription-based services. *Id.* The law requires that businesses allow

consumer[s] to terminate the automatic renewal or continuous service offer at will, and without engaging any further steps that obstruct or delay the consumer's ability to terminate immediately. The [law] would require the business to provide a method of termination that is either online in the form of a prominently located direct link or button to cancel or by a termination email, as provided.

Assemb. B. 390, 2021–2022 Leg., Reg. Sess. (Cal. 2021); CAL. BUS. & PROF. CODE § 17602(d) (West 2022).

⁹ See *infra* Part I.

¹⁰ See D. Tighe, *Leading Subscription Services Used by Consumers in the United States 2021*, STATISTA (Aug. 1, 2022), <https://www.statista.com/statistics/1004527/leading-subscription-services-used-by-consumers-us/> [https://perma.cc/QSS5-RRHQ]; Rachel King, *Subscription Boxes and Meal Kits are Seeing a Resurgence with Shoppers Stuck at Home*, FORTUNE (July 23, 2020, 12:00 PM), <https://fortune.com/2020/07/23/coronavirus-subscription-boxes-blue-apron-hello-fresh-dollar-shave-club-retail-trends/> [https://perma.cc/78N6-7LS6] (discussing the history of subscription).

Part II analyzes the impact of cancellation barriers on individual consumers.¹¹ This Part demonstrates how barriers to cancellation are coercive and violate a fundamental economic principle: the principle of voluntary exchange.¹² This Part ends with a discussion of the effect of cancellation barriers on individuals with disabilities and older adults.¹³

Part III discusses the current landscape of Automatic Renewal Laws (ARL) at both the federal and state levels.¹⁴ On the federal level, this Part argues that Congress should codify the FTC's recent enforcement policy into law.¹⁵ On the state level, this Part articulates deficiencies within existing state ARLs, arguing that states should adopt legislation mirroring the ARL provisions within the recently amended California Business and Professions Code.¹⁶

Part IV discusses an alternative solution that Netflix adopted to reduce the harms of cancellation barriers: automatically canceling the subscriptions of inactive users after a set period of inactivity.¹⁷ This alternative solution will benefit both companies and consumers in the long run.¹⁸

I. THE EXPLOSIVE RISE OF THE SUBSCRIPTION-BASED MODEL

The subscription-based model is nothing new.¹⁹ The origins of the modern subscription-based economy can be traced to as early as 1856 when consumers could rent a sewing machine for \$3 per month after a \$5 deposit.²⁰ One could also look to the Book of the Month Club founded in 1926, in which customers paid a subscription fee to receive a new book in the mail each month.²¹ These

¹¹ See *infra* Part II.

¹² See *infra* Section II.C.

¹³ See *infra* Section II.E.

¹⁴ See *infra* Part III.

¹⁵ See *infra* Section III.A.

¹⁶ See *infra* Section III.B.

¹⁷ See *infra* Part IV.

¹⁸ See *id.*

¹⁹ See *infra* Part IV; see also Jeff Wilkins, *The Rise of the Industrial Subscription Economy*, FORBES (Apr. 29, 2019, 9:15 AM), <https://www.forbes.com/sites/forbestechcouncil/2019/04/29/the-rise-of-the-industrial-subscription-economy/?sh=33b2aa9665d8> [<https://perma.cc/TBP6-M6YE>].

²⁰ Wilkins, *supra* note 19.

²¹ Ernie Smith, *Delivered to Your Door*, TEDIUM (Feb. 16, 2017), <https://tedium.co/2017/02/16/monthly-subscription-box-delivery-history/> [<https://perma.cc/MAW2-JC6K>].

early adopters of the subscription-based model understood the benefit of repeat sales in generating sustainable business revenue.²²

With the rise of technology, the subscription-based model continually evolved, particularly within the information, entertainment, and consumer goods industries.²³ For example, in October of 1996, AOL introduced a flat-rate internet service.²⁴ Then, in 1997, Netflix introduced the concept of DVD rentals as a subscription-based model.²⁵ In 2002, SiriusXM launched its popular satellite radio service.²⁶ From there, it was off to the races.²⁷

Today, there is a subscription service for almost anything, ranging anywhere from wine and beauty products to flowers and toothbrushes.²⁸ There are a vast number of subscription services for streaming online content, including Netflix, Hulu, HBO Max, Apple TV+, and Disney Plus.²⁹ Many gym memberships and fitness boutiques utilize subscription-based models, including Planet Fitness, Gold's Gym, and Orangetheory Fitness.³⁰ Major news outlets,

²² See Meeghan Smolinsky, *A New Reading Experience: Book of the Month Club*, PA. CTR. FOR THE BOOK (2010), <https://pabook.libraries.psu.edu/literary-cultural-heritage-map-pa/feature-articles/new-reading-experience-book-month-club> [<https://perma.cc/8PZU-QDFE>].

²³ See Wilkins, *supra* note 19.

²⁴ *Id.*

²⁵ Taylor Ferber, *This Look Back at Netflix's Early Days Will Blow Your Mind*, BUSTLE (Aug. 29, 2017), <https://www.bustle.com/p/what-was-netflix-like-20-years-ago-spoiler-alert-its-almost-unrecognizable-79755> [<https://perma.cc/S7Z4-3W4K>].

²⁶ Brian Santo, *The Consumer Electronics Hall of Fame: SiriusXM Satellite Radio System*, IEEE SPECTRUM (Oct. 31, 2019), <https://spectrum.ieee.org/the-consumer-electronics-hall-of-fame-siriusxm-satellite-radio-system> [<https://perma.cc/X5EM-24F9>].

²⁷ See Erica Puisis, *11 of the Best Subscription Boxes for Treating Yourself Each Month*, FORBES (Mar. 24, 2021, 12:30 PM), <https://www.forbes.com/sites/forbes-personal-shopper/2021/03/24/monthly-subscription-boxes/?sh=60b04d264e64> [<https://perma.cc/MP7J-35EJ>].

²⁸ See, e.g., *id.*

²⁹ Kourtnee Jackson et al., *Best Streaming Service of 2022: Netflix, Disney Plus, HBO Max, Hulu, Starz, and More*, CNET (June 23, 2022, 4:00 AM), <https://www.cnet.com/tech/services-and-software/best-streaming-service-of-2022/> [<https://perma.cc/KZ5C-KJJT>].

³⁰ See Amanda Capritto, *Best Gym Memberships*, VERYWELLFIT (Dec. 21, 2021), <https://www.verywellfit.com/best-gym-memberships-4780237> [<https://perma.cc/Y2PJ-MGLH>].

including The New York Times and the Washington Post, have increasingly utilized online subscription-based services.³¹ There are even subscription-based services for private jets.³²

The most successful subscription-based services have millions of subscribers around the world.³³ Amazon Prime is the most popular subscription service in the United States, with approximately half of the U.S. population subscribed to its service.³⁴ As of June 2021, Amazon Prime has over 200 million subscribers.³⁵ As of July 2021, Netflix has 208 million paying subscribers, 74.4 million of which are within the United States and Canada.³⁶

The growth of the subscription-based economy shows no sign of stopping.³⁷ As of 2021, the subscription-based economy has grown more than 435% over the past nine years.³⁸ The subscription-based economy is projected to grow to \$1.5 trillion by 2025, which is more than double its 2021 valuation.³⁹

³¹ Carmen Ang, *Ranked: The Most Popular Paid Subscription News Websites*, VISUALCAPITALIST (Apr. 26, 2021), <https://www.visualcapitalist.com/ranked-the-most-popular-paid-subscription-news-websites/> [https://perma.cc/J64D-NKT5].

³² Skye Sherman, *Why Buying a Private Jet Membership During the Pandemic Was Worth It, According to Someone Who Did It*, TRAVEL+LEISURE (Mar. 26, 2021), <https://www.travelandleisure.com/airlines-airports/set-jet-private-jet-membership> [https://perma.cc/Z56G-9BSP].

³³ See, e.g., Don Davis, *Most Amazon Shoppers Have Eyes Only for Amazon*, DIGITALCOM.360 (Nov. 3, 2021), <https://www.digitalcommerce360.com/article/amazon-prime-membership/> [https://perma.cc/MK8Y-6Q7Z].

³⁴ Tighe, *supra* note 10.

³⁵ Daniel Howley, *Amazon Prime Now Has 200 Million Members, Jumping 50 Million in One Year*, YAHOO (Apr. 15, 2021), <https://news.yahoo.com/amazon-prime-has-200-million-members-142910961.html> [https://perma.cc/AX2M-ZLC6].

³⁶ Alex Sherman, *The Honeymoon Is Over for Streaming Services: Here's Where the Major Players Stand*, CNBC (July 5, 2021, 9:00 AM), <https://www.cnbc.com/2021/07/05/streaming-services-compared-revenue-arpu-for-netflix-disney-more.html> [https://perma.cc/CH8M-KZP7].

³⁷ See Heather Long & Andrew Van Dam, *Everything's Becoming a Subscription, and the Pandemic Is Partly to Blame*, WASH. POST (June 1, 2021, 1:12 PM), <https://www.washingtonpost.com/business/2021/06/01/subscription-boom-pandemic/> [https://perma.cc/QC32-Y35X].

³⁸ Faisal Kalim, *The Subscription Economy Has Grown Over 435% in 9 Years (and the Uptick Is Expected to Continue)*, WHAT'S NEW IN PUB'G (Mar. 5, 2021), <https://whatsnewinpublishing.com/the-subscription-economy-has-grown-over-435-in-9-years-and-the-uptick-is-expected-to-continue/> [https://perma.cc/H7MG-Q5QF].

³⁹ Torbati, *supra* note 1.

A significant part of this growth can be attributed to substantial shifts in consumer preferences and behaviors.⁴⁰ In recent years, consumers have prioritized convenience over ownership.⁴¹ This trend has forced companies to develop subscription services that meet consumer demand and capitalize on the power of the internet to facilitate repeat transactions.⁴² Meanwhile, investors are increasingly keen on financially supporting businesses with predictable subscription-based revenue.⁴³

These subscription-based services offer numerous benefits, including products and services that are often personalized, convenient, and cheaper than those found shopping in-store or a la carte.⁴⁴ However, this initial convenience comes at a cost.⁴⁵ According to a 2017 survey, more than one-third of Americans have enrolled in a subscription service, like a gym membership, without even knowing it.⁴⁶ Of those surveyed, only about fifty percent found it easy to cancel the services automatically charging them.⁴⁷ In attempting to cancel the services, many consumers faced lengthy calls with customer service or had to draft and send an email to the company directly expressing their desire to cancel.⁴⁸

⁴⁰ See Wilkins, *supra* note 19.

⁴¹ *Id.*

⁴² See *id.*

⁴³ *Id.*

⁴⁴ Tony Chen et al., *Thinking Inside the Subscription Box: New Research on E-Commerce Consumers*, MCKINSEY & CO. (Feb. 9, 2018), <https://www.mckinsey.com/industries/technology-media-and-telecommunications/our-insights/thinking-inside-the-subscription-box-new-research-on-ecommerce-consumers#0> [<https://perma.cc/H3KY-E5JB>].

⁴⁵ See, e.g., Krystal Hu, *One-Third of Americans Are Paying for Subscriptions Without Knowing It*, YAHOO! FIN. (Aug. 22, 2017), <https://finance.yahoo.com/news/one-third-americans-paying-subscriptions-without-knowing-165413533.html> [<https://perma.cc/7S68-R3UV>] (describing costs incurred by consumers who forget to cancel subscriptions).

⁴⁶ *Id.* (“Thirty-five percent of Americans say they signed up for a subscription or membership, such as a gym, that enrolled them in an automatic payment plan without even realizing it . . .”).

⁴⁷ *Id.*

⁴⁸ John Solomon, *Why You Shouldn't Make Cancellations Hard for Your Customers*, CHARGE BEE BLOG (June 9, 2021), <https://www.chargebee.com/blog/cancellations-hard-customers/> [<https://perma.cc/8GY6-MM3L>].

II. CANCELLATION BARRIERS AND THEIR HARMS

Given the rise in popularity of subscription-based services and their prominent role in everyday life, cancellation barriers pose an increasing threat to consumer welfare.⁴⁹ If you have signed up for a subscription service, you have likely encountered cancellation barriers, forcing you to search for an impossible-to-find cancellation button or wait on hold to speak with a customer service representative.⁵⁰ Such cancellation barriers are not only annoying—they are also coercive and exploitative.⁵¹

A. Customer Retention: The Incentive Behind Cancellation Barriers

Generally, more subscribers equate to more profits.⁵² For this reason, customer retention⁵³ is the core feature of the subscription-based model.⁵⁴ In the subscription-based economy, the measure of a company's customer retention is known as its "churn rate."⁵⁵

A company's churn rate is one of the most important financial metrics of a company's financial performance.⁵⁶ Companies utilize a vast array of tactics to increase customer retention and lower its churn rate, including seeking customer feedback,

⁴⁹ See Torbati, *supra* note 1.

⁵⁰ See Solomon, *supra* note 48.

⁵¹ See Torbati, *supra* note 1.

⁵² See John Solomon, *5 Secrets to Reduce Subscription Churn*, CHARGE BEE BLOG (Apr. 16, 2021), <https://www.chargebee.com/blog/5-secrets-reduce-subscription-churn/> [<https://perma.cc/L7PZ-TDZ4>] (noting that loss of customer interest yields less profit).

⁵³ Customer retention is defined as "the activities and actions companies and organizations take to reduce the number of customer defections." *Customer Retention Definition*, NG DATA, <https://www.ngdata.com/dictionary/customer-retention-definition/> [<https://perma.cc/5CYF-CSWG>].

⁵⁴ See Edward Lewis, *Subscription Models: A Successful Way of Consumer Retention*, THE DRUM (Nov. 6, 2020), <https://www.thedrum.com/profile/superb-media/news/subscription-models-a-successful-way-of-customer-retention> [<https://perma.cc/C53L-Y6HT>].

⁵⁵ A company's "churn rate" is a metric for subscription-based services, measuring the number of customers who cancelled the service over a given period of time. Diego Gomes, *5 Metrics that Every Subscription Business Should Measure*, SAASHOLIC, <https://www.saasholic.com/5-metrics-that-every-subscription-business-should-measure/> [<https://perma.cc/J4QS-85EH>].

⁵⁶ See *id.* ("Churn is the enemy of any subscription company.").

monitoring subscriber usage, and attempting to increase value for their consumers.⁵⁷

However, this incentive to retain consumers can also push companies to make it unnecessarily difficult for consumers to cancel their subscriptions.⁵⁸

The Executive Director of the National Consumers League, Sally Greenberg, called “difficult cancellations and renewals ‘a predatory practice that many industries are addicted to for an obvious reason—a monthly stream of income.’”⁵⁹ This powerful incentive drives companies to employ specific tactics, known as “dark patterns,” to retain paying customers.⁶⁰

B. The “Dark Pattern” of Cancellation Barriers

Barriers to cancellation are classified as “dark patterns.”⁶¹ A dark pattern refers to a tactic that “subvert[s] consumer choice, often in connection with subscription services.”⁶² User Experience Specialist Harry Brignull⁶³ coined the term to describe how companies design software interfaces to “subtly trick users.”⁶⁴

⁵⁷ See 14 *Smart and Simple Ways to Reduce Churn in Your Online Subscription Service*, FORBES (Dec. 16, 2020, 8:10 AM), <https://www.forbes.com/sites/forbesfinancecouncil/2020/12/16/14-smart-and-simple-ways-to-reduce-churn-in-your-online-subscription-service/?sh=5f51423146ff> [<https://perma.cc/2SWM-JUWV>].

⁵⁸ See e.g., Finn Myrstad, *Amazon Manipulates Customers to Stay Subscribed*, FORBRUKERRÅDET (Jan. 14, 2021), <https://www.forbrukerradet.no/news-in-english/amazon-manipulates-customers-to-stay-subscribed/> [<https://perma.cc/SW9C-YXZ2>] (describing Amazon as a company that uses dark patterns to manipulate customers).

⁵⁹ David Lazarus, *Canceling Subscriptions Shouldn’t Be Like Running an Obstacle Course*, L.A. TIMES (Oct. 27, 2020, 6:00 AM), <https://www.latimes.com/business/story/2020-10-27/column-canceling-subscriptions> [<https://perma.cc/ENU3-TWW2>].

⁶⁰ Tyler G. Newby et al., *FTC Warns Companies Offering Subscription Services to Avoid Using “Dark Patterns”*, FENWICK (Nov. 4, 2021), <https://www.latimes.com/business/story/2020-10-27/column-canceling-subscriptions> [<https://perma.cc/29LQ-T6XF>].

⁶¹ *Id.*

⁶² *Id.*

⁶³ Eric Ravenscraft, *How to Spot—and Avoid—Dark Patterns on the Web*, WIRED (July 29, 2020, 9:00 AM), <https://www.wired.com/story/how-to-spot-avoid-dark-patterns/> [<https://perma.cc/E3V3-CD6E>].

⁶⁴ *Id.*

By design, canceling a subscription service can oftentimes be an annoying, tedious, and time-consuming ordeal.⁶⁵ According to Michal Strahilevitz, a marketing professor at St. Mary's College of California, it is almost always easier to sign up for a subscription service than it is to cancel.⁶⁶ While companies may claim that automatic renewal is in the best interest of the consumer, the reality is that automatic renewal almost always benefits the financial interest of companies.⁶⁷ Consequently, many companies purposely make it difficult to cancel.⁶⁸

Companies utilize a vast array of dark patterns.⁶⁹ For example, many companies exploit their consumers by purposefully incorporating dark patterns into their website design.⁷⁰ The “click-to-subscribe, call-to-cancel” scheme is a particularly notorious dark pattern.⁷¹

If you have signed up for a subscription service in your lifetime, you have probably encountered the “click-to-subscribe, call-to-cancel” scheme—a cumbersome and outright annoying dark pattern.⁷² When it comes time to cancel, consumers are oftentimes forced to call the company and speak with a representative—usually only during regular business hours and with prolonged wait times.⁷³

⁶⁵ See *id.*; Laura Daily, *Don't Let Forgotten Online Subscriptions Rack up Monthly Charges. Here's How To Take Control.*, WASH. POST (May 25, 2021, 7:00 AM), https://www.washingtonpost.com/lifestyle/home/recurring-subscription-fees-how-to-end/2021/05/24/e083b70c-b71f-11eb-96b9-e949d5397de9_story.html. [<https://perma.cc/BM6M-GB84>].

⁶⁶ Daily, *supra* note 65.

⁶⁷ See Ravenscraft, *supra* note 63.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Carlin Becker, *FTC Cracks Down on 'Click to Subscribe, Call to Cancel' Billing for Subscription Services*, BIRMINGHAM TIMES (Nov. 18, 2021), <https://www.birminghamtimes.com/2021/11/ftc-cracks-down-on-click-to-subscribe-call-to-cancel-billing-for-subscription-services/> [<https://perma.cc/4YSL-DZK8>].

⁷² Mark Frauenfelder, *FTC Says "Click to Subscribe, Call to Cancel" Is Illegal*, BOINGBOING (Nov. 17, 2021, 9:11 AM), <https://boingboing.net/2021/11/17/ftc-says-click-to-subscribe-call-to-cancel-is-illegal.html#:~:text=If%20you%20live%20in%20California,is%20The%20New%20York%20Times> [<https://perma.cc/SWT5-8CCC>].

⁷³ Natasha Frost, *Why Call-to-Cancel Policies Are an Accessibility Nightmare*, MODERN RETAIL (July 22, 2020), <https://www.modernretail.co/retail>

As of February 2022, JustFab, a leading fashion-subscription company,⁷⁴ infamously utilizes the “click-to-subscribe, call-to-cancel scheme” to retain subscribers, despite a history of consumer complaints.⁷⁵ Between 2012 and 2015, the Better Business Bureau received thousands of complaints against JustFab from customers experiencing difficulty trying to cancel.⁷⁶ As of this writing, JustFab customers wishing to cancel their subscription must either call the company directly or utilize an online chat function to communicate directly with a representative.⁷⁷ Like many other companies,⁷⁸ JustFab forces its customers to jump through hoops to cancel their subscriptions.⁷⁹

JustFab is by no means alone.⁸⁰ According to a 2021 survey conducted by the American Press Institute, of the 526 U.S. news organizations surveyed, less than half made it easy for consumers to cancel their subscriptions online.⁸¹ Meanwhile, more than half of U.S. news organizations specifically trained customer service agents “in tactics to dissuade customers who call to unsubscribe.”⁸² By making it exceedingly easy for consumers to sign up but difficult for them to cancel, companies boost consumer retention at the expense of the consumer.⁸³

ers/why-call-to-cancel-policies-are-an-accessibility-nightmare/ [https://perma.cc/HG76-FNWC].

⁷⁴ *JustFab Reviews: Is JustFab Right for You?*, JUSTFAB (Mar. 12, 2022), <https://www.mysubscriptionaddiction.com/b/justfab> [https://perma.cc/7HHS-8YTL].

⁷⁵ Autumn Rose, *5 Common Subscriptions That Are Nearly Impossible to Cancel*, GO BANKING RATES (July 11, 2016), <https://www.gobankingrates.com/saving-money/budgeting/common-subscriptions-nearly-impossible-cancel/> [https://perma.cc/VX9D-QWV3]; *Terms of Service*, JUSTFAB (Dec. 1, 2020), <https://www.justfab.com/policy/terms> [https://perma.cc/RJ5M-UZMH].

⁷⁶ Rose, *supra* note 75.

⁷⁷ JUSTFAB, *supra* note 75.

⁷⁸ See Sendhil Mullainathan, *So Easy to Sign Up, and So Hard to Cancel*, N.Y. TIMES (Dec. 7, 2013), <https://www.nytimes.com/2013/12/08/business/so-easy-to-sign-up-and-so-hard-to-cancel.html> [https://perma.cc/L85V-LALY].

⁷⁹ JUSTFAB, *supra* note 75.

⁸⁰ See Mullainathan, *supra* note 78.

⁸¹ Sarah Scire, *The End of “Click to Subscribe, Call to Cancel?” One of the News Industry’s Favorite Retention Tactics Is Illegal, FTC Says*, NIEMANLAB (Nov. 15, 2021, 10:52 AM), <https://www.niemanlab.org/2021/11/the-end-of-click-to-subscribe-call-to-cancel-one-of-the-news-industrys-favorite-retention-tactics-is-illegal-ftc-says/> [https://perma.cc/7D9Y-P257].

⁸² *Id.*

⁸³ *Id.*

Even with the option of online cancellation, dark patterns are still at play.⁸⁴ A prime example is Amazon Prime (no pun intended).⁸⁵ Subscribing to Amazon Prime is seamless, only taking a few seconds and one or two clicks.⁸⁶ Cancellation, however, is an entirely different story,⁸⁷ as Amazon makes it unreasonably difficult for customers to unsubscribe from its service.⁸⁸ In order to cancel, subscribers must navigate a number of intentionally designed hurdles.⁸⁹ These hurdles include a complicated navigation interface, deceptive wording, and confusing options.⁹⁰ These dark patterns obscure and manipulate consumers, effectively forcing some consumers to pay for a service they no longer want.⁹¹

Another dark pattern involves the use of free trials.⁹² Companies often entice consumers by offering a free trial period for their subscription service to allow consumers to try out a “product or service at no charge for a limited time, usually a few weeks or months.”⁹³ However, free trials often stack the deck against the consumer, burdening them with remembering to quit.⁹⁴ Consequently, free trials are not so free.⁹⁵ In fact, they are often quite costly.⁹⁶

⁸⁴ Emma Woollacott, *Amazon Prime Too Hard to Cancel, Consumer Watchdog Complains*, FORBES (Jan. 14, 2021, 8:26 AM), <https://www.forbes.com/sites/emmawoollacott/2021/01/14/amazon-prime-too-hard-to-cancel-consumer-watchdog-complains/?sh=3c24030082f8> [https://perma.cc/C7XX-J5ZK].

⁸⁵ *Id.* As of January 2021, “Amazon Prime’s cancellation policy is facing legal challenges in Europe, with the Norwegian Consumer Council (NCC) calling it a ‘deliberate attempt to confuse and frustrate customers.’” *Id.*

⁸⁶ Adam Smith, *Amazon Must Now Let Users Leave Prime in Just Two Clicks*, YAHOO! FIN. (July 6, 2022, 6:50 AM), <https://finance.yahoo.com/news/amazon-must-now-let-users-105023518.html> [https://perma.cc/8ZWL-75SX].

⁸⁷ *See How Do I Start a Subscription?*, AMAZON, <https://www.amazon.com/b?ie=UTF8&node=15283820011> [https://perma.cc/VE3U-V48Y].

⁸⁸ Woollacott, *supra* note 84.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Emily Stewart, *How Free Trials Trick You into Thinking You’ll Get Something for Nothing*, VOX (June 16, 2021, 12:18 PM), <https://www.vox.com/the-goods/22374466/free-trial-subscription-scam> [https://perma.cc/53MS-UXU3].

⁹³ *Free Trial Subscription Business Model*, VINDICIA, <https://vindicia.com/products/subscribe/free-trial-subscription-business-model/#:~:text=Free%20trial%20considerations,a%20few%20weeks%20or%20months> [https://perma.cc/245F-A8NM].

⁹⁴ Stewart, *supra* note 92.

⁹⁵ *Id.*

⁹⁶ *Id.*

From 2017 to 2019, consumers filed more than 50,000 complaints about free trials to the Better Business Bureau in the United States and Canada.⁹⁷ In total, consumers have lost well over \$1.4 billion on free trials, with a median loss of \$140 per victim.⁹⁸

As discussed in the next two sections, these dark patterns violate the fundamental economic principle of voluntary exchange.⁹⁹ The use of dark patterns undoubtedly harms U.S. consumers, especially individuals experiencing disabilities or lessened technical fluency.¹⁰⁰

C. Burdensome Cancellation Is Coercive and Violates Fundamental Economic Principles

When cancellation is burdensome, subscription-based services violate a critical underpinning of the free market economy: the principle of voluntary exchange.¹⁰¹

To illustrate this point, imagine you have a hankering for some bananas. You head to your local grocery store and purchase some bananas at a price you freely consent to pay. Congratulations, you just participated in a voluntary exchange.¹⁰²

The principle of voluntary exchange is at the heart of any free market economy.¹⁰³ Voluntary exchange is defined as an “[e]xchange between two parties where each is free to refuse to trade.”¹⁰⁴ The principle of voluntary exchange “gives people [the] power to determine the conditions under which they live.”¹⁰⁵ So, if you did not wish to buy the bananas, you would not have done so; likewise, if the grocery store did not want to sell the bananas, the store would not have done so.¹⁰⁶

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *See infra* Sections II.C–D.

¹⁰⁰ Frost, *supra* note 73.

¹⁰¹ Indeed Editorial Team, *Voluntary Exchange: Definition and Examples*, INDEED (July 7, 2021), <https://www.indeed.com/career-advice/career-development/voluntary-exchange> [<https://perma.cc/5J7G-9RC5>].

¹⁰² *Id.*

¹⁰³ *Voluntary Exchange*, A DICTIONARY OF ECONOMICS (Oxford Univ. Press 5th ed. 2017).

¹⁰⁴ *Id.*

¹⁰⁵ Thomas Christiano, *The Tension Between the Nature and the Norm of Voluntary Exchange*, 54 S. J. OF PHIL. 109, 110 (2016).

¹⁰⁶ *See id.*

Now, imagine that you signed up for a monthly subscription service to deliver bananas directly to your home. For the first few months, you really enjoyed the convenience that the subscription provided—you no longer had to travel to the grocery store. Around month five, however, you decide to cancel the service.

This could be for an infinite number of reasons: your potassium levels may be too high, you might be trying to save for an upcoming vacation, or you may have even lost your job. You spend an hour diligently working to cancel your subscription, but you are unsuccessful. The company may have required that you call a toll-free hotline and wait on hold to speak with a representative, or they may have deliberately buried their cancellation link somewhere on their website. Inevitably, the next payment date rolls around, and you are left with yet another charge to your credit card and lots of unwanted bananas.

Unlike the in-store purchase, you were not “free to refuse” the subscription-based charge, despite taking reasonable efforts to cancel the service.¹⁰⁷ In this way, companies that make it difficult to cancel subscriptions defy the principle of voluntary exchange.¹⁰⁸ If, upon taking reasonable efforts, a consumer cannot cancel a subscription, any additional service charge constitutes an involuntary exchange.¹⁰⁹ When transactions are involuntary, the benefits of a free market begin to break down.¹¹⁰ Subscriptions place financial liability on consumers without them necessarily realizing it.¹¹¹ Thanks to “automatic selling and preauthorized electronic payments,”¹¹² consumers are often required to pay for products they may not necessarily want or need in the future.¹¹³ This

¹⁰⁷ April Glaser, *Customers Fight Surprise Charges as Online Subscriptions Surge*, NBC NEWS (Dec. 23, 2020, 3:27 PM), <https://www.nbcnews.com/business/business-news/customers-fight-surprise-charges-online-subscriptions-surge-n1252149> [<https://perma.cc/WV2F-VSV3>].

¹⁰⁸ See e.g., *id.*

¹⁰⁹ *Involuntary Exchange*, AMOS WEB, https://www.amosweb.com/cgi-bin/awb_nav.pl?s=wpd&c=dsp&k=involuntary+exchange [<https://perma.cc/XD2Y-XLUW>] (defining involuntary exchange as “[t]he process of unwillingly trading one valuable commodity (good, service, or resource) for another . . .”).

¹¹⁰ Will Stancil, *A Better Way to Cancel Your Gym Membership (And Avoid Other Hazards of Autopayment)*, 2015 U. ILL. J.L. TECH. & POL’Y 103, 106 (2015).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

market inefficiency doesn't just harm consumers.¹¹⁴ By insulating themselves from market forces, companies employing the subscription-based model are less responsive to customer needs and therefore offer less competitive products and services.¹¹⁵

Undoubtedly, cancellation barriers foster involuntary exchange.¹¹⁶ For this reason, increased regulation and further legislation is needed to protect consumers.

As discussed within the next several sections, the involuntariness of such transactions is particularly alarming when considering those in society who may not have the time, energy, or wherewithal to cancel a subscription service.¹¹⁷

D. How Subscription Services Exploit Consumers

Not only are barriers to cancellation highly coercive; they are also highly exploitative.¹¹⁸ Perhaps most obviously, businesses benefit from consumers' failure to read the fine print.¹¹⁹ A 2017 Deloitte survey "found that 91% of people consent to terms of service without reading them. For younger people, ages 18–34, that rate was even higher, with 97% agreeing to conditions before reading."¹²⁰

This has significant repercussions within the context of subscription-based services.¹²¹ Without reading the fine print, consumers are often left in the dark regarding cancellation procedures.¹²² Thus, when individuals go to cancel their subscriptions,

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Supra* notes 109–15 and accompanying text.

¹¹⁷ *See infra* Sections II.D–E.

¹¹⁸ *See* Dana E. Neuts, *FTC Warns Against Subscription Tricks and Traps, Steps Up Enforcement*, SUBSCRIPTION INSIDER (Nov. 8, 2021), <https://www.subscriptioninsider.com/topics/regulation-and-compliance/ftc-warns-against-subscription-tricks-and-traps-steps-up-enforcement> [<https://perma.cc/G8GC-5WGP>].

¹¹⁹ Jessica Guynn, *What You Need to Know Before Clicking 'I Agree' on that Terms of Service Agreement or Privacy Policy*, USA TODAY (Jan. 29, 2020, 2:21 PM), <https://www.usatoday.com/story/tech/2020/01/28/not-reading-the-small-print-is-privacy-policy-fail/4565274002/> [<https://perma.cc/9VCA-NN6V>].

¹²⁰ Caroline Cakebread, *You're Not Alone, No One Reads Terms of Service Agreement*, BUS. INSIDER (Nov. 15, 2017, 7:30 AM), <https://www.businessinsider.com/deloitte-study-91-percent-agree-terms-of-service-without-reading-2017-11> [<https://perma.cc/R6BG-SP3K>].

¹²¹ *See id.*

¹²² *Id.*

many are left confused, having tacitly agreed to onerous cancellation procedures that they never actually read.¹²³ Consumers then become unwittingly ensnared in a subscription scheme.¹²⁴

Companies also profit off of the forgetfulness of consumers.¹²⁵ One survey showed that over 70% of consumers have paid for an unwanted subscription simply because they forgot to cancel the service.¹²⁶ This forgetfulness is very lucrative for businesses.¹²⁷ For instance, in 2014, AOL generated all of its profits by selling \$20 subscriptions to unwitting consumers.¹²⁸ Because of the potential impacts on revenue, companies have a financial incentive not to remind consumers about upcoming charges.¹²⁹

E. The Exploitation of Vulnerable Populations

For people within vulnerable populations, cancellation procedures often prove particularly burdensome.¹³⁰ Dark patterns may “seem shady to a digital native or a person with at least a high school education but might successfully trick a person who is older and less digitally proficient, or less educated, or a non-native English speaker.”¹³¹

For instance, Caroline Bailey, a deaf woman residing in Austin, Texas, signed up for a Fabletics subscription online.¹³² But, Fabletics required customers to speak with a representative

¹²³ *See id.*

¹²⁴ *See id.*

¹²⁵ *Hiatus Survey: 62% of Consumers Waste Money on Unwanted Subscriptions Because They Don't Cancel Automatic Renewals*, GLOBE NEWSWIRE (Mar. 21, 2016, 9:20 AM), <https://www.globenewswire.com/news-release/2016/03/21/1240985/0/en/Hiatus-Survey-62-of-Consumers-Waste-Money-on-Unwanted-Subscriptions-Because-They-Don-t-Cancel-Automatic-Renewals.html> [<https://perma.cc/Z8GJ-QMRS>].

¹²⁶ *Id.*

¹²⁷ Matthew Yglesias, *AOL's Only Profitable Because 2 Million Forgot to Cancel Their Subscriptions*, VOX (Aug. 7, 2014, 12:10 PM), <https://www.vox.com/2014/8/7/5978721/aol-subscription-profits> [<https://perma.cc/5YYJ-DKBT>].

¹²⁸ *See id.*

¹²⁹ *See id.*

¹³⁰ Katharine Miller, *Can't Unsubscribe? Blame Dark Patterns*, STAN. UNIV. HUMAN-CENTERED A.I. (Dec. 13, 2021), <https://hai.stanford.edu/news/cant-unsubscribe-blame-dark-patterns> [<https://perma.cc/E2FC-ES6D>].

¹³¹ *Id.*

¹³² Frost, *supra* note 73.

to cancel their subscription.¹³³ For several months, Caroline found herself unable to cancel each month's order of clothes because she was unable to call and speak with a representative.¹³⁴ While Fabletics eventually offered Caroline the option to cancel over the internet, it is evident that such call-to-cancel procedures are especially burdensome for people with disabilities.¹³⁵

Cancellation barriers may also significantly impact older adults.¹³⁶ The aging demographic is continuously increasing in size, as is its presence online.¹³⁷ Unfortunately, these individuals may be vulnerable to financial abuse due, in part, to their accumulated savings, decreased cognitive ability, and a greater tendency to trust companies.¹³⁸ Consequently, within the context of subscription-based services, older adults may face greater difficulty in understanding and canceling their subscriptions.¹³⁹ For example, one survey showed that fifty-seven percent of adults ages 53–62 have been charged unexpectedly after signing up for a free trial that they failed to cancel.¹⁴⁰

When a company makes its cancellation procedure annoyingly difficult to the average consumer, it makes cancellation even more difficult for individuals with disabilities.¹⁴¹ For this reason, companies should implement simple and easy cancellation procedures. For example, allowing customers to cancel subscriptions

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ AARP, *Watch Out for Surprise Auto-Renewal Payments* (Sept. 5, 2017), <https://www.aarp.org/money/credit-loans-debt/info-2017/automatic-payment-memberships-subscriptions-fd.html> [<https://perma.cc/LW84-EEC8>].

¹³⁷ *Why Are Seniors the Fastest Demographic on Social Media?*, NPR (Nov. 25, 2013, 4:31 PM), <https://www.npr.org/templates/story/story.php?storyId=247220424> [<https://perma.cc/Y5QB-JAE5>].

¹³⁸ AARP, *supra* note 136.

¹³⁹ *Id.*

¹⁴⁰ *Id.* While the referenced survey indicates that people over the age of 72 are less likely to unintentionally enroll in an automatic payment after a free trial than individuals within the age range of 53–62, the limited data available fails to suggest a reason for this trend. Perhaps individuals aged 72 and older are less susceptible to certain dark patterns because they utilize the internet less and thus are less likely to sign up in the first place. Further research is needed to analyze the impact of dark patterns on older Americans who are increasingly online. *See id.*

¹⁴¹ Frost, *supra* note 73.

online with one or two clicks, while forgoing especially burdensome practices, like the “call-to-cancel” regime.

Digital accessibility typically “refers to the inclusive practice of removing barriers that prevent interaction with, or access to websites, digital tools and technologies, by people with disabilities.”¹⁴² This definition of digital accessibility should be expanded to encompass cancellation barriers.¹⁴³ To make the internet truly more accessible, the use of dark patterns must also be examined and regulated.¹⁴⁴ As discussed in the next section, the FTC’s October 28, 2021 Policy Statement helps to protect consumers from the harms faced as a result of this exploitation.¹⁴⁵

III. THE EXISTING REGULATORY LANDSCAPE

In recent years, several states and the federal government have started to crack down on subscription-based services and the use of dark patterns.¹⁴⁶ As of March 2021, thirty states and the District of Columbia have enacted Automatic Renewal Laws (ARL) to protect consumers from dark patterns.¹⁴⁷ However, this

¹⁴² *Digital Accessibility*, GEO. L., <https://www.law.georgetown.edu/your-life-career/campus-services/information-systems-technology/digital-accessibility/> [<https://perma.cc/TF5G-SPKR>]; Sam Stemler, *Do All Websites Have to Be ADA Compliant?*, ACCESSIBLE METRICS (Dec. 20, 2019), <https://www.accessiblemetrics.com/blog/do-all-websites-have-to-be-ada-compliant/> [<https://perma.cc/AAL6-JDS3>]. Today, there is currently no law or policy explicitly requiring private companies to make their websites digitally accessible. *Id.* But, courts have overwhelmingly ruled that the internet is a place of public accommodation. *Id.* Thus, pursuant to the Americans with Disabilities Act, it is generally accepted that if a website sells goods or services, that website must be digitally accessible to people who utilize assistive devices. *Id.*

¹⁴³ Stemler, *supra* note 142.

¹⁴⁴ *FTC Press Release*, *supra* note 1.

¹⁴⁵ *Id.*

¹⁴⁶ Max Bernstein et al., *California Passes Updated Automatic Renewal Law*, JDSUPRA (Oct. 27, 2021), <https://www.jdsupra.com/legalnews/california-passes-updated-automatic-2029550/> [<https://perma.cc/4BU4-XLFX>].

¹⁴⁷ Matthew Adler et al., *Automatic Renewal Laws: Legislation to Watch in 2021*, JDSUPRA (Mar. 12, 2021), <https://www.jdsupra.com/legalnews/automatic-renewal-laws-legislation-to-5675258/> [<https://perma.cc/FH2Z-KVMK>]. The California definition of Automatic Renewal: An automatic renewal is defined as a “plan or arrangement in which a paid a subscription or purchasing agreement is automatically renewed at the end of a definite term for a subsequent term.” CAL. BUS. & PROF. CODE § 17601(a) (West 2022). The Virginia definition: An automatic renewal “means a plan or arrangement in which a

legislation is not enough.¹⁴⁸ Fortunately, the FTC and states like California and Colorado are paving the way in meaningfully reducing the dark patterns surrounding cancellation.¹⁴⁹

A. *The FTC's 2021 Crackdown on Cancellation Barriers*

The FTC recently cracked down on companies engaged in autorenewal and negative option marketing.¹⁵⁰ On October 28, 2021, the FTC issued an enforcement policy statement warning companies against the use of dark patterns, including barriers to cancellation for subscription-based services.¹⁵¹

The policy statement includes a warning that companies will face legal action if cancellation is not easy and simple.¹⁵² The policy specifically targets “negative option sellers,” which is a term applied to companies that “interpret a consumer’s silence or failure to . . . cancel [a subscription]” as an implied agreement to continue charging for the company’s product or service.¹⁵³ The policy statement requires companies to institute mechanisms for cancellation that are, at a minimum, as easy to use as the mechanism for signing up.¹⁵⁴ In practice, this means subscription-based services can no longer impose unreasonable hurdles to cancellation.¹⁵⁵

Specifically, the policy statement clarifies that under federal law, such as the Restore Online Shoppers’ Confidence Act (ROSCA), negative option sellers must allow consumers to cancel their subscription via the same method they used to enroll.¹⁵⁶ More simply, the policy states that, if a customer signs up online, they must be able to cancel online, or if they signed up via a mobile phone application, they should be able to unenroll from that same application.¹⁵⁷ Furthermore, the policy establishes that

paid subscription or purchasing agreement is automatically renewed at the end of a definite term for a subsequent term.” VA. CODE ANN. § 59.1-207.45 (2022).

¹⁴⁸ Adler et al., *supra* note 147.

¹⁴⁹ *FTC Press Release*, *supra* note 1; Bernstein et al., *supra* note 146.

¹⁵⁰ *FTC Press Release*, *supra* note 1.

¹⁵¹ *Id.*

¹⁵² *FTC Enforcement Policy*, *supra* note 1, at 60,822, 60,826.

¹⁵³ *Id.* at 60,826.

¹⁵⁴ *Id.*

¹⁵⁵ *See id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

a company may not unnecessarily impede cancellation, citing common barriers to cancellation including hanging up on consumers when they call to cancel, placing consumers on long holds, and providing false or misleading information on how to cancel the service.¹⁵⁸

Samuel Levine, the FTC Bureau of Consumer Protection Director, noted that the “enforcement policy statement makes clear that tricking consumers into signing up for subscription programs or trapping them when they try to cancel is against the law.”¹⁵⁹ Levine added that “[f]irms that deploy dark patterns and other dirty tricks should take notice.”¹⁶⁰

This is a step in the right direction.¹⁶¹ Given the explosive rise of subscription-based services¹⁶² and the numerous harms of cancellation barriers,¹⁶³ this policy initiative is both timely and necessary.¹⁶⁴ This policy takes aim at many of the challenges faced by consumers upon attempting to cancel a subscription, like having to call a customer service hotline to cancel a subscription they signed up for online, or having to navigate through convoluted screens to find the cancellation button.¹⁶⁵

More work is needed, however, on both the federal and state levels, to cement this policy into law and continue protecting consumers from future hurdles.¹⁶⁶ On the federal level, Congress should codify the FTC’s policy into law to protect consumers from these predatory practices beyond the tenure of the current Administration.¹⁶⁷ On the state level, states should continue to

¹⁵⁸ *Id.*

¹⁵⁹ *FTC Press Release*, *supra* note 1.

¹⁶⁰ *Id.*

¹⁶¹ Keith Barnett et al., *FTC to “Ramp Up Enforcement” on Subscription Services*, JDSUPRA (Nov. 8, 2021), <https://www.jdsupra.com/legalnews/ftc-to-ramp-up-enforcement-on-5405976/> [<https://perma.cc/Z843-TX7P>].

¹⁶² *Subscription Business Revenue Grows 437% Over Nearly a Decade as Consumer Buying Preferences Shift from Ownership to Usership*, BUS. WIRE (Mar. 3, 2021), <https://www.businesswire.com/news/home/20210303005291/en/Subscription-Business-Revenue-Grows-437-Over-Nearly-a-Decade-as-Consumer-Buying-Preferences-Shift-from-Ownership-to-Usership> [<https://perma.cc/FBY7-J8ED>].

¹⁶³ *See supra* Sections II.D–E.

¹⁶⁴ *See* BUS. WIRE, *supra* note 162.

¹⁶⁵ Barnett et al., *supra* note 161.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

enact legislation further protecting consumers from subscription abuse.¹⁶⁸ As discussed in the next section, California is leading the way.¹⁶⁹

B. State Regulations

California is setting the gold standard for state regulation of subscription-based services.¹⁷⁰ In 2017, California passed Senate Bill No. 313, which amended the California Business and Professions Code to include an online cancellation provision.¹⁷¹ Per this provision, if a consumer signed up for a subscription online, the business must also provide an option to cancel online.¹⁷²

In October of 2021, California further amended the California Business and Professions Code with the passage of Assembly Bill No. 390, which mandated additional protections for consumers and steeper regulations on subscription services.¹⁷³ The bill stipulates that

a business that allows a consumer to accept an automatic renewal or continuous service offer online shall allow a consumer to terminate the automatic renewal or continuous service exclusively online, at will, and without engaging any further steps that obstruct or delay the consumer's ability to terminate the automatic renewal or continuous service immediately.¹⁷⁴

Assembly member Marc Berman authored the new law.¹⁷⁵

Describing the law's purpose, Berman stated he believed canceling a subscription should be just as easy as it was to sign up.¹⁷⁶ He expressed his concern for millions of Californians who have been subjected to predatory cancellation barriers for years.¹⁷⁷

¹⁶⁸ See *infra* notes 185–86 and accompanying text.

¹⁶⁹ Bernstein et al., *supra* note 146.

¹⁷⁰ *Id.*

¹⁷¹ S.B. 313, 2017–2018 Leg., Reg. Sess. (Cal. 2017).

¹⁷² CAL. BUS. & PROF. CODE § 17602(c) (West 2018).

¹⁷³ Assemb. B. 390, 2021–2022 Leg., Reg. Sess. (Cal. 2021).

¹⁷⁴ Assemb. B. 390, 2021–2022 Leg., Reg. Sess. (Cal. 2021); CAL. BUS. & PROF. CODE § 17602(d) (West 2022).

¹⁷⁵ *California Makes it Easier to Cancel Online Subscriptions*, EAST COUNTY TODAY (Oct. 5, 2021), <https://eastcountytoday.net/california-makes-it-easier-to-cancel-online-subscriptions/> [<https://perma.cc/26CK-H92R>].

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

Notably, the law received bipartisan support and received widespread praise from a variety of stakeholders, including Consumer Attorneys, Consumer Action representatives, and the California Low-Income Consumer Coalition.¹⁷⁸

Every state should adopt legislation like California Assembly Bill No. 390 because it reduces the possibility of burdensome cancellation barriers—freeing consumers of involuntary transactions.¹⁷⁹ Thankfully, several states already have similar laws on the books, including New York, Vermont, Delaware, Colorado, and Illinois.¹⁸⁰

Several states have enacted ARL laws that do not go far enough in protecting consumers.¹⁸¹ One example is Virginia’s ARL.¹⁸² Virginia’s ARL requires that the business provide the consumer with the basic information necessary for them to be able to cancel their subscription, but fails to set forth a meaningful standard to ensure that cancellation is easy for consumers.¹⁸³ In the interest of consumer welfare, Virginia should amend this legislation and adopt the standard set by California and a handful of other states.¹⁸⁴

Given the explosive growth of subscription-based services, every state should strongly consider implementing legislation modeled after California’s ARL¹⁸⁵ in order to protect their populations from the exploitative and coercive use of dark patterns.

IV. A NON-REGULATORY FIX: THE NETFLIX APPROACH

Beyond government regulation, there are alternate means to lessen the harms to consumers within the subscription-based

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Reilly, *supra* note 8. The Delaware and Colorado laws will require “a cost-effective, timely and easy-to-use cancellation mechanism, including online cancellation for subscriptions online.” Stephanie A. Sheridan & Meegan Brooks, *Several States Enact Significant Auto-Renewal Law Updates*, STEPTOE (Oct. 28, 2021), <https://www.steptoec.com/en/news-publications/several-states-enact-significant-auto-renewal-law-updates.html> [<https://perma.cc/KLL3-H6S6>]. In August of 2021, Illinois added an online cancellation requirement that will take effect on January 1, 2022, and “will require an online cancellation option for consumers who enter into agreements online.” *Id.*

¹⁸¹ *See, e.g.*, VA. CODE ANN. § 59.1-207.46 (2022).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *See id.*; *supra* notes 179–80 and accompanying text.

¹⁸⁵ Reilly, *supra* note 8.

market.¹⁸⁶ Netflix is one company that is actively taking steps to help protect consumers from dark patterns, whilst boosting brand loyalty.¹⁸⁷ Beyond featuring a cancellation button on its website, Netflix has gone a full step further: canceling some customers' subscriptions for them.¹⁸⁸ In 2020, Netflix adopted a new policy that helps mitigate the harms intrinsic to subscription-based services.¹⁸⁹ If a user has not watched anything on their platform for a year, Netflix asks the user to confirm that they would like to keep their membership.¹⁹⁰ If the member fails to respond, Netflix automatically cancels the user's subscription and halts additional charges.¹⁹¹ In a statement, Product Innovation Chief Eddy Wu stated, "[W]e hope this new approach saves people some hard earned cash."¹⁹²

Netflix's approach to cancellation is revolutionary within the realm of subscription-based services. While continuing to charge unwitting customers would certainly prove profitable for the company, Netflix is prioritizing long-term consumer satisfaction over short-term profits.¹⁹³ By shifting the burden away from the consumer after one year, Netflix has decided to mitigate some of the long-term harms associated with onerous barriers to cancellation.¹⁹⁴

Netflix is onto something. In a world of customer reviews and online forums, reputation matters.¹⁹⁵ Difficult cancellation processes not only harm current subscribers; they also prevent future subscribers from signing up in the first place.¹⁹⁶ Companies that understand and value long-term consumer satisfaction should work to eliminate cancellation barriers within their subscription-based services.

¹⁸⁶ See, e.g., Eddy Wu, *Helping Members Who Haven't Been Watching Cancel*, NETFLIX (May 21, 2020), <https://about.netflix.com/en/news/helping-members-who-havent-been-watching-cancel> [<https://perma.cc/Q4ZE-WQKZ>].

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *See id.*

¹⁹⁴ *See id.*; *supra* notes 110–15 and accompanying text.

¹⁹⁵ Solomon, *supra* note 48.

¹⁹⁶ *Id.*

CONCLUSION

Subscription services should be just as easy to cancel as they are to sign up for. Unfortunately, many subscription services in the United States remain difficult to cancel.¹⁹⁷

Subscriptions should be easy to cancel for a variety of reasons. First and foremost, our free-market economy is premised on the principle of voluntary exchange.¹⁹⁸ When companies utilize “dark patterns” to create barriers to cancellation, many consumers are left with charges they did not consent to in exchange for products or services they no longer want.¹⁹⁹ In other words, barriers to cancellation are coercive and result in involuntary transactions.²⁰⁰ Consumers should not be forced into making purchases.²⁰¹

Second, barriers to cancellation are highly exploitative, especially for individuals with diverse needs or lesser digital fluency.²⁰² Other individuals simply do not have the time in their day to wait on hold for hours on end to cancel a monthly subscription.²⁰³ For these reasons, barriers to cancellation should be effectively regulated.

The FTC’s October 2021 policy enforcement statement is a major step in the right direction in eradicating barriers to cancellation within the sphere of subscription-based services.²⁰⁴ By ensuring that individuals who sign up online can cancel online, the FTC is working to eliminate the primary “dark pattern” used by companies to retain subscribers: the “call-to-cancel” regime.²⁰⁵

Several states are also making major headway.²⁰⁶ California is leading the charge, with its recent passage of California Assembly

¹⁹⁷ April Glaser, *Customers Fight Surprise Charges as Online Subscriptions Surge*, NBC NEWS (Dec. 23, 2020, 3:27 PM), <https://www.nbcnews.com/business/business-news/customers-fight-surprise-charges-online-subscriptions-surge-n1252149> [<https://perma.cc/XEQ8-TGXG>].

¹⁹⁸ *Supra* Section II.C.

¹⁹⁹ *Supra* notes 60–62, 107–17 and accompanying text.

²⁰⁰ *Supra* notes 107–17 and accompanying text.

²⁰¹ *Id.*

²⁰² *Supra* Section II.E.

²⁰³ *See* Frost, *supra* note 73 and accompanying text.

²⁰⁴ *See FTC Press Release*, *supra* note 1 and accompanying text.

²⁰⁵ *Supra* Part III.

²⁰⁶ *Supra* Section III.B.

Bill No. 390.²⁰⁷ This Bill amends the Business and Professions Code to require that consumers have the ability to cancel their subscriptions online and introduces new policies such as limiting additional promotions during the cancellation process.²⁰⁸ Given the exponential rise of subscription-based services,²⁰⁹ more states should adopt legislation aimed at making cancellation easier.²¹⁰

When it comes to cancellation barriers, consumers must remain vigilant to protect themselves and their wallets.²¹¹ Federal, state, and local governments should continue to take action to protect consumers, especially members of vulnerable populations, from predatory dark patterns.²¹² Companies should also reevaluate their use of dark patterns and discontinue these unethical practices, to the benefit of companies and consumers.²¹³ After all, what is the true value of a company that knowingly attempts to profit from involuntary and exploitative charges?

²⁰⁷ *Supra* notes 169–80 and accompanying text.

²⁰⁸ *Id.*

²⁰⁹ *Supra* Part I.

²¹⁰ *Supra* notes 170–77 and accompanying text.

²¹¹ *See* Glaser, *supra* note 197.

²¹² *Supra* notes 204–05 and accompanying text.

²¹³ *Supra* notes 195–96 and accompanying text.