

# LIKE, COMMENT, YOU MUST SUBSCRIBE: EVOLVING CONSUMER PROTECTION FOR THE SUBSCRIPTION ECONOMY

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## ABSTRACT

The global economy has transformed over the past two decades with the rise of electronic commerce. One trend that has increased at a rapid pace recently is subscriptions. The COVID-19 pandemic escalated the move to subscriptions even more in consumer products as wide-ranging as streaming television, cars, and video games. While the relationship between consumer protection and a subscription economy has been explored at some level before, the increased dependence on subscriptions apparent over the past four years – as well as new forms of the subscription model – warrants revisiting the topic.

## I. INTRODUCTION

Americans are subscribers. The COVID-19 pandemic, with its emphasis on shelter-in-place and social distancing, encouraged American consumers to subscribe unlike ever before. One out of three consumers added some sort of online subscription in the early days of the pandemic for needs and wants alike: while many purchased access to view entertainment like TV shows, others subscribed to food delivery services and exercise programs.<sup>1</sup> This trend has increased over the past decade: the percentage of Americans over the age of 18 with a subscription of a video-on-demand service like Netflix or Hulu grew from 52% in 2015 to 78% in 2021.<sup>2</sup> Brand-specific subscriptions in particular have surged: if a consumer, for example, wants to watch certain TV programming offered by CBS, they will need to purchase a subscription to Paramount+; if someone wants instead to watch a sports program, they may need to buy access to the Disney bundle with Disney+, Hulu, and ESPN+.<sup>3</sup>

One recent controversy has emerged with vehicle manufacturer BMW regarding subscription plans for some features in their cars. BMW is well known as a luxury car brand, and one common feature found in luxury cars is heated seats. In some countries, the company has

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<sup>1</sup> David Dykes, *Americans More Than Tripled Subscription Service Spending Amid Social Distancing*, GREENVILLEBUSINESSMAG.COM (May 14, 2020), <https://www.greenvillebusinessmag.com/2020/05/14/308970/americans-more-than-tripled-subscription-service-spending-amid-social-distancing/>.

<sup>2</sup> Julia Stoll, *SVOD Service User Shares in the U.S. 2015-2021*, STATISTA (Oct. 22, 2021), <https://www.statista.com/statistics/318778/subscription-based-video-streaming-services-usage-usa/>.

<sup>3</sup> See, e.g., DISNEYPLUS.COM, <https://www.disneyplus.com/welcome/disney-hulu-espn-bundle>. The animated comedy *South Park* parodied bundle names in its 2021 Post Covid Special: in the fictional future of the early 2060s, most goods and services included the word “Plus” at the end. The Post Covid Special incidentally was released on Paramount+. See Ryan Izay, *South Park: Every Easter Egg & Reference in Post Covid*, SCREENRANT.COM (Dec. 5, 2021), <https://screenrant.com/south-park-post-covid-easter-eggs-references/>.

moved to a subscription model for heated seats, causing complaints about sales similar to micro-transactions commonly used in other industries like video games.<sup>4</sup> Despite the backlash, it appears that subscriptions for features and even upgraded vehicle performance will likely become a permanent part of vehicle sales, raising questions about its suitability in the industry.<sup>5</sup>

Recent data suggests that the average adult American has 2-3 subscriptions, but a segment of consumers dubbed “power subscribers” have over ten, adding up to over \$100 a month.<sup>6</sup> Given the general trend of subscriptions becoming increasingly more common even in areas of the economy where they traditionally do not exist in high numbers, it may be time to evaluate how best to both defend and educate consumers about this new economy.

Naturally, there are a few problems, ethical and financial, that are created with such a substantial increase in subscriptions. If subscriptions are unnecessarily bundled with other products at an increased price that a consumer is unlikely to use, that may generate economic waste. Negative option billing (discussed below), for example, requires consumers to actively intervene before a recurring charge is placed on their account. Product and service providers may even rely on consumers forgetting about those charges in order to realize higher profits.

It is important to form a distinction, however, between all forms of subscriptions and those that create legal and ethical questions. Access-based consumption, long a staple of marketing and other business disciplines, describes situations where there is definite and clear value in avoiding a purchase; for example, economic and environmental benefits take place when sharing a rarely used product or service, and consumers derive satisfaction from unique experiences and the variety that results without the disadvantages of ownership.<sup>7</sup> It is the subscription systems that create inefficiencies and consumer harm that need to be confronted.

There is a broader psychological basis for owning goods. Humans demand an “ownership understanding” even when sharing products.<sup>8</sup> This fundamental connection of law and psychology seriously impacts how people feel about subscriptions (particularly subscription fatigue) and lacking physical, exclusive ownership of a product. Microtransactions in particular could also lead to a feeling of missing the “ownership understanding”. It may be the case that the initial feeling of ownership from purchasing a product deteriorates once one realizes that additional incremental purchases are needed to gain full access to whatever it is that they bought or to remain competitive.

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<sup>4</sup> Stefan Nicola and Wilfried Eckl-Dorna, *BMW Bets the Fuss Over Its Heated-Seat Subscriptions Will Pass*, BLOOMBERG.COM (August 4, 2022), <https://www.bloomberg.com/news/articles/2022-08-04/bmw-bets-the-fuss-over-its-heated-seat-subscriptions-will-pass>.

<sup>5</sup> *Id.*

<sup>6</sup> Heather Long and Andrew Van Dam, *Everything’s Becoming a Subscription, and the Pandemic is Partly to Blame*, WASHINGTON POST (June 1, 2021), <https://www.washingtonpost.com/business/2021/06/01/subscription-boom-pandemic/>.

<sup>7</sup> Stephanie J. Lawson et al., *Freedom From Ownership: An Exploration of Access-Based Consumption*, 69 J. BUS. RSCH. 2615, at 2616 (2016).

<sup>8</sup> See Donald J. Kochan, *I Share, Therefore It’s Mine*, 51 U. RICH. L. REV. 909 (2016).

## II. THE ETHICS OF A SUBSCRIPTION ECONOMY

### A. Consumer Education

While American consumers are spending more on subscriptions, they are paying less attention to the fruits of that spending.<sup>9</sup> Many Americans spend a lot of money on negative options, a system of financial transactions where the customer must take some form of action to prevent a charge from happening on their account. One particular concern that causes consumers substantial harm is the conversion of free trials into negative options. This commonly takes place: consumers sign up for a product or service that they believe is free, only to discover charges on their account.<sup>10</sup>

A variety of negative options exist in modern commerce, including a payment that renews automatically, prenotification plans, and free-to-pay conversions.<sup>11</sup> If the customers fail to take an action (such as unsubscribing) or remain silent, the customer will have to pay the amount they agreed to when starting the service.<sup>12</sup> This stands in stark contrast to what laws generally require in terms of ensuring that consumers know what they are purchasing. Previous legal and policy research has provided an overview of the ethical concerns with negative options, but recent developments over the past five years merit an examination of the changes to the economy and potential solutions.<sup>13</sup>

There are also many marketing and design tactics that serve to confuse consumers. Dark patterns, for instance, rely on biases inherent in people to push them to make decisions that they may not otherwise make were it not for those efforts.<sup>14</sup> Some consumers, for example, may not even be actively aware that they have subscribed for a new product or service. In a 2017 survey, 35% of those asked reported that they been enrolled in a recurring payment without realizing it, and nearly half (48%) of those surveyed admitted that they had forgotten to cancel a free trial before its expiration.<sup>15</sup>

The Federal Trade Commission (FTC) plays a critical role in ensuring that Americans are aware of the risks involved with subscription transactions. The FTC provides consumer advice on its website, including suggestions on free trials, auto-renewals, and negative option subscriptions.<sup>16</sup> It has described the nature of consumer protection, and its part to play in it, as a pyramid: education and self-regulation serve as the base, while law enforcement mechanisms are at the top.<sup>17</sup> The enforcement component of consumer protection, the FTC explains, is for situations where the other two parts of the pyramid cannot fix the ethical concern.<sup>18</sup> Following that logic, it makes sense that solutions to problems encountered in subscription ethics should start from education and self-regulation, then move to enforcement when needed.

States additionally play an important part in educating citizens about the risks inherent in subscriptions. The attorney general's offices in various states are charged with providing useful

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<sup>9</sup> *The State of Subscription Services Spending*, WEST MONROE CONSULTING (August 2021), <https://www.westmonroe.com/perspectives/report/the-state-of-subscription-services-spending>.

<sup>10</sup> *Safeguarding American Consumers: Fighting Fraud and Scams During the Pandemic: Virtual Hearing Before the Subcomm. on Consumer Prot. and Commerce of the Comm. on Energy and Commerce*, 117 Cong. 1, 34-35 (2021).

<sup>11</sup> FED. TRADE COMM'N., Notices: Enforcement Policy Statement Regarding Negative Option Marketing, 86 Fed. Reg. 60822 (Nov. 4, 2021).

<sup>12</sup> Sophia Wang, Note, *One Size Does Not Fit All: The Shortcomings of Current Negative Option Legislation*, 26 CORNELL J. LAW & PUB. POL. 197 (2016).

<sup>13</sup> *Id.*

<sup>14</sup> Jamie Luguri and Lior Jacob Strahilevitz, *Shining a Light on Dark Patterns*, 13 J. LEGAL ANALYSIS 43 (2021).

information about the ethical concerns present with subscriptions and, if needed, pursuing legal action against companies that are misusing subscriptions to deceive consumers. One such example took place in Washington in October 2022, where a survey of about 1,200 residents provided by the Washington State Office of the Attorney General found that 59% reported being unintentionally enrolled in a subscription plan when they thought it was a one-time purchase.<sup>19</sup> Additionally, 63% reported that they had accidentally enrolled in a subscription plan more than once.<sup>20</sup> In comments related to the results of the survey, the attorney general urged residents to contact his office if they had encountered unclear subscription policies.<sup>21</sup> Similar warnings sent out by the New York and Minnesota attorneys general show that negative options, auto-renewals, and other problematic practices have caught the attention of the states.<sup>22</sup>

The survey above highlights the dual roles at the state level: providing valuable information and enforcement. The Washington attorney general's office requested this survey so that they could collect more information about how serious of a problem auto-renewals and hidden fees are for Washington citizens. The enforcement element takes place when a complaint has been filed with the office so that the attorney general can pursue legal action against companies that repeatedly or severely confuse consumers. Yet given the nature of education in reducing these instances, the attorneys general of several states have wisely chosen to focus on that component by surveying residents and encouraging them to speak up if they have been affected.

## ***B. Corporate Profit and Costs***

Many companies offering subscription services have seen profits soar over the past few years. Exercise company Peloton, for example, saw its subscription revenue increase 144% from January to March 2021.<sup>23</sup> Objectively, this is positive from a corporate perspective: better profits encourage other businesses to adapt and change their business model to increase revenue. However, from a philosophical standpoint, the dark side of subscriptions (negative options and

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<sup>15</sup> Brady Porche, *Poll: Recurring Charges Are Easy to Start, Hard to Get Out Of*, CREDITCARDS.COM (Aug. 22, 2017), <https://www.creditcards.com/credit-card-news/autopay-poll/>.

<sup>16</sup> *Getting In and Out of Free Trials, Auto-Renewals, and Negative Option Subscriptions*, FED. TRADE COMM'N. (May 2021), <https://consumer.ftc.gov/articles/getting-out-free-trials-auto-renewals-negative-option-subscriptions>.

<sup>17</sup> *FTC Pyramid*, FED. TRADE COMM'N (2022), <https://www.ftc.gov/media/64831>. Not to be confused with pyramid schemes, which the FTC is also tasked with preventing through education. *Multi-Level Marketing Businesses and Pyramid Schemes*, FED. TRADE COMM'N (2022), <https://consumer.ftc.gov/articles/multi-level-marketing-businesses-pyramid-schemes>.

<sup>18</sup> Roscoe B. Starek, *The Consumer Protection Pyramid: Education, Self-Regulation, and Law Enforcement*, FED. TRADE COMM'N (Dec. 2, 1997), <https://www.ftc.gov/news-events/news/speeches/consumer-protection-pyramid-education-self-regulation-law-enforcement>.

<sup>19</sup> Elise Takahama, *Millions in WA May Have Enrolled in a Subscription Service by Accident*, SEATTLE TIMES (Oct. 12, 2022), <https://www.seattletimes.com/seattle-news/millions-in-wa-may-have-enrolled-in-a-subscription-service-on-accident/>, citing *Consumer Feedback Regarding Recurring Charges and Hidden Fees*, WASH. STATE OFF. OF THE ATT'Y. GEN. (July 30, 2022), <https://agportal-s3bucket.s3.amazonaws.com/Hardwick%20Research%20Report%20Hidden%20Fees%207-30-22.pdf>.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> See, e.g., *Consumer Alert: Attorney General James Issues Warning Against Marketing Schemes Aimed at Trapping Consumers into Recurring Payments*, N.Y. STATE OFF. OF THE ATT'Y GEN. (Nov. 17, 2021), <https://ag.ny.gov/press-release/2021/consumer-alert-attorney-general-james-issues-warning-against-marketing-schemes>; *Premature Magazine Renewal Notices*, MINN. OFF. OF THE ATT'Y GEN. (2022), <https://www.ag.state.mn.us/consumer/Publications/EarlyMagazineRenewalNotices.asp>.

<sup>23</sup> Long and Van Dam, *supra* note 6.

auto-renewals) runs counter to the proper role of the corporation in consideration of the larger society. It also allows for circumstances where for-profit corporations can seek out inflated prices without much in the way of constraint. Recent research shows that a lot of the price increases for consumer goods in the post-pandemic economy are because consumers are willing to pay the higher prices.<sup>24</sup> Consumers are becoming less price-sensitive for their favorite brands; one study noted that they are 30% less price-sensitive in 2019 as compared to 2006.<sup>25</sup> Although this research targeted grocery store shoppers, one can translate that concept to subscriptions. As a result, subscription services that are replete with favorite brands can charge higher rates; for example, if someone who grew up in the 1990s wanted to watch their favorite nostalgic shows from that era, they are less likely to be satisfied with something similar and more likely to be inelastic – willing to pay whatever (reasonable) price the streaming service charges.

Increasing prices at will runs against many corporate philosophies that seek to tie businesses to society. Stakeholder theory states that corporations need to be responsive to all of those impacted by its business practices, not just shareholders.<sup>26</sup> Contemporary research has demonstrated that companies often focus too narrowly on defining their customer base, leading to what some call a “new marketing myopia”.<sup>27</sup> As conversations about the appropriate role of for-profit businesses and their obligations to society become more widespread, corporations and other forms of businesses that follow a subscription model should consider the effects of auto-renewals, dark patterns, microtransactions, and other methods on society and other stakeholders. Failing to do so could risk alienating customers and other key parties affected by their strategies.

Corporations also have a cost associated with the current landscape of differing laws. In the video game industry, later considered in this article as the home of problematic microtransactions<sup>28</sup>, organizations like the Entertainment Software Association – the self-described “voice and advocate of the video game industry”<sup>29</sup> – are concerned about the costs of keeping up with the many distinct state laws and the distribution of its user base.<sup>30</sup> These expenses could lead to a lower-quality product due to the resources needed to comply with the various laws and regulations, or it could also lead to those companies passing along lower profits to consumers in the form of higher prices. An existing complex web of varying laws can also have damaging effects on markets; it largely benefits big companies that can better absorb the costs of compliance, provides yet another hurdle for entrants into markets, generates numerous loopholes, and makes it more challenging for government entities to enforce those regulations.<sup>31</sup>

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<sup>24</sup> Rachel Layne, *Why Companies Raise Their Prices: Because They Can*, WORKING KNOWLEDGE: HARVARD BUS. SCH. (May 5, 2022), <https://hbswk.hbs.edu/item/why-companies-raise-their-prices-because-they-can>.

<sup>25</sup> *Id.*

<sup>26</sup> R. Edward Freeman and other scholars have firmly established stakeholder theory as a cornerstone of business ethics. See, e.g., Anja Matwijiwi and Bronik Matwijiwi, *The Stakeholder Approach to Basic Economic and Social Rights: International Law and the Case of Milton Friedman versus R. Edward Freeman*, 14 INT’L STUD. J. 13 (2017).

<sup>27</sup> N. Craig Smith et al., *The New Marketing Myopia*, 29 J. PUB. POL’Y & MKTG. 4 (2010).

<sup>28</sup> Hardy, *infra* note 38.

<sup>29</sup> *About the ESA*. ENTERTAINMENT SOFTWARE ASSOC. (2022), <https://www.theesa.com/about-esa/>.

<sup>30</sup> Christian Genetski, *Brown v. EMA/ESA: U.S. Supreme Court Stops California from Playing Games with the First Amendment*, 15 SMU SCI. & TECH L. REV. 135 (2012), at 150.

<sup>31</sup> Rohit Chopra (June 17, 2022), *Rethinking the Approach to Regulations*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/about-us/blog/rethinking-the-approach-to-regulations/>.

### III. POTENTIAL SOLUTIONS TO SUBSCRIPTION CONCERNS

Setting the foundation for the types of ethical issues found in the subscription economy is a good theoretical exercise on its own; however, just talking about these concerns does not accomplish much in addressing them. There are manifold approaches to tackling the ethical problems that arise with subscriptions: federal legislation, state government action, administrative agencies, market-based solutions, and an examination of how other governments are making substantial changes to their subscription laws can all yield valuable information on comprehensive solutions.

#### A. Legislation

It is the responsibility of the U.S. Federal Trade Commission to protect customers from deceptive practices and from being taken advantage of in commerce.<sup>32</sup> The FTC has some tools at its disposal: Section 5 of the FTC Act, the Restore Online Shoppers' Confidence Act (or ROSCA), and the Telemarketing Sales Rule.<sup>33</sup> The most frequently used of these tools is Section 5 of the FTC Act.<sup>34</sup> This guidance, however, has been described as antiquated and ill-suited to challenge modern negative option tactics.<sup>35</sup> The FTC and individual states also do not have the resources to respond to the many complaints that they receive each year ranging from inadequate disclosure, lack of consent to enroll in payment, and cumbersome unsubscribing policies.<sup>36</sup> To pave over the gaps left by the FTC Act, legislators have made a few unsuccessful attempts thus far to increase consumer protection.

The Unsubscribe Act, first introduced by Rep. Mark Takano of California in 2017, sought to establish more definition respecting negative option agreements than earlier attempts.<sup>37</sup> Some attempt has been made to regulate predatory microtransactions in the United States, specifically those that use pay-to-win and loot box models in video games played frequently by minors, but relevant legislation has stalled for the time being.<sup>38</sup> One law that has been suggested to combat the effects of dark patterns in marketing is the Deceptive Experiences to Online Users Reduction Act, or the DETOUR Act.<sup>39</sup> The bipartisan group of co-sponsors note in their efforts to reach the public that dark patterns are reliant on lowering consumer information and interfering with consumer choice.<sup>40</sup>

However, there is some question as to whether additional legislation is the answer, as opposed to more careful enforcement of the laws that currently exist. Some in the legal community have claimed that the current patchwork of laws discussed above accomplish the goal of preventing

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<sup>32</sup> For an overview of the FTC's efforts to address negative options and subscriptions, see Wang, *supra* note 12, at 202.

<sup>33</sup> FED. TRADE COMM'N., *supra* note 11, at 60823; 16 C.F.R. 425.1 (1998).

<sup>34</sup> FED. TRADE COMM'N., *supra* note 11, at 60823 (noting that "Section 5...is the core consumer protection statute enforced by the commission and...has served as the primary mechanism for addressing deceptive negative option claims.").

<sup>35</sup> *Id.* at 60825.

<sup>36</sup> FED. TRADE COMM'N., *supra* note 11, at 60823. The FTC notes the "...high volume of complaints demonstrate[s] there is prevalent unabated consumer harm" taking place. *Id.*

<sup>37</sup> Unsubscribe Act, H.R. 1097, 115<sup>th</sup> Cong. (2017).

<sup>38</sup> See Matt Hardy, *Predatory Microtransaction Regulations: An International Comparison*, 17 S.C. J. INT'L. L. & BUS. 109, 123 (2021).

<sup>39</sup> Deceptive Experiences to Online Users Reduction Act, S. 1084, 116<sup>th</sup> Cong. (2019).

<sup>40</sup> Scott A. Goodstein, Comment, *When The Cat's Away: Techlash, Loot Boxes, and Regulating "Dark Patterns" in the Video Game Industry's Monetization Strategies*, 92 U. COLO. L. REV. 285, 321 (2021).

customers from being taken advantage of by subscriptions but need to be refined and expanded so that they do so more efficiently. The guidance could be clarified considerably to better help both consumers and businesses, but interrupting that process with more rules and regulations could be counterproductive.<sup>41</sup>

The common trend for this federal legislation, though, is that these proposals are not becoming law. The last action in Congress for the bills and resolutions discussed above is referral to a subcommittee, mainly the Subcommittee on Consumer Protection and Commerce in the House of Representatives and the Committee on Commerce, Science, and Transportation in the Senate.<sup>42</sup> The subsequent inaction is fatal for these proposals, leaving the original sponsors to regroup and try to reintroduce the legislation with some changes, as seen with the trend of the Unsubscribe Act from its original version in 2017 to the updated version in 2021.

If the federal government does not act on the issue, does that leave legislative solutions to the states? Several states have taken the initiative to change their automatic renewal laws (ARLs) given that federal legislation has so far failed. For example, California, Colorado, and Illinois have all updated their ARLs in 2022<sup>43</sup>. Some of these acts result from personal experiences that state legislators have had with automatic renewals that motivated them to write legislation.<sup>44</sup>

There are limits to what individual states can achieve, though. The Washington survey cited above explained that the most frequent offenders were online retailers like Amazon, Hulu, and Netflix.<sup>45</sup> Large online retailers may be difficult for each state to regulate given their more universal presence. It may also generate a scenario where consumer rights are so significantly different from state to state that interstate commerce is seriously impacted, which naturally would lead to a call for uniformity in laws across boundaries.

## ***B. Government Action***

One valuable tool that a state government can use is the education of its residents. While the FTC is the main avenue to accomplish this task at the federal level, states are more diverse in their approach. This makes sense given that individual states hold the police power; they are closer in contact to crafting laws that affect the person, their behavior, and their morals. As they play such a substantial role over a person's behavior, they naturally have many options for how they make that happen.<sup>46</sup> Public outreach is an often-used method for ensuring that members of the public understand the risks of economic concerns like auto-renewals; for example, Colorado's

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<sup>41</sup> See, e.g., Commissioner Christine S. Wilson's dissent in whether the FTC should issue an additional policy statement regarding negative options while another rulemaking effort in the same sphere was already underway. FED. TRADE COMM'N., *supra* note 11, at 60826-27.

<sup>42</sup> See, e.g., the current status of the Unsubscribe Act of 2021 as of September 21, 2022. CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/house-bill/6083?s=1&r=29>.

<sup>43</sup> Cal. Bus. & Professions Code § 17602, [https://leginfo.ca.gov/faces/codes\\_displayText.xhtml?lawCode=BPC&division=7.&title=&part=3.&chapter=1.&article=9](https://leginfo.ca.gov/faces/codes_displayText.xhtml?lawCode=BPC&division=7.&title=&part=3.&chapter=1.&article=9) (2022); Colo. Rev. Stat. 6-1-731-32, <https://leg.colorado.gov/sites/default/files/images/olls/crs2021-title-06.pdf> (2022); Illinois Automatic Contract Renewal Act, 815 ILCS 601, <https://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=2363&ChapterID=67> (2022).

<sup>44</sup> Elaine S. Povich, *It Turns Out State Lawmakers Hate Auto-Renew Contracts Too*, STATELINE: THE PEW CHARITABLE TRUSTS (Mar. 4, 2022), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/03/04/it-turns-out-state-lawmakers-hate-auto-renew-contracts-too>.

<sup>45</sup> WASH. STATE OFF. OF THE ATT'Y GEN, *supra* note 19.

<sup>46</sup> See Santiago Legarre, *The Historical Background of the Police Power*, 9 J. CONST. L. 745 (2007), for an overview of the federal and state interaction with the police power.

Office of the Attorney General uses a program called Stop Fraud Colorado to convey that information to its denizens.<sup>47</sup>

Administrative agencies can also use the power of notice-and-comment rulemaking to remedy the information gap between seller and consumer. Increasing the level of disclosure fits in neatly with contemporary approaches to federal issues. For example, in late September 2022, the U.S. Department of Transportation issued a proposed rule requiring airlines and third parties to disclose ancillary service fees when providing fee and ticketing information.<sup>48</sup> Notably, though, administrative priorities regarding regulation often change based on the objectives of the presidency; this rule was originally proposed during the Obama presidency but then removed during the Trump administration due to concerns of cost and whether it was necessary.<sup>49</sup> Political interest among Americans can even vary year to year: in a 2020 survey, 54% of those polled said that they wanted the government to do more regarding the nation's problems, while in 2021, 52% asserted that the government was too involved and should leave more to individual people.<sup>50</sup> A higher demand for more government regulation tends to follow in the wake of major national events like the economic recession of the early 1990s and the September 11, 2001 attacks.<sup>51</sup>

### C. *Market-Based Solutions*

Educating consumers is not limited to a government function; using the private sector to teach people about the legal and ethical components of subscriptions is one attractive avenue to rectify the asymmetry between consumer and producer. Borrowing insights from the marketing discipline can be productive in narrowing down the types of consumers who may be at risk from the downsides of subscription management and then providing them with options that mitigate this risk.

Financial literacy remains at abysmal levels in the United States. Fewer than 20% of American high school students are required to take a course on personal finance.<sup>52</sup> There are a variety of products – free and otherwise – which try to remedy this gap and address a need that education has been unable to satisfy. Among those available are Savings Spree, FamZoo, Steps, Stash, and Greenlight.<sup>53</sup> Similarly, there is a place in the market for applications or products that keep consumers informed on their subscription services and the costs of using them; applications

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<sup>47</sup> COLO. OFF. OF THE ATT'Y. GEN., *Auto-Renewal Contracts*, Colorado Stop Fraud (2022), <https://www.stopfraudcolorado.gov/fraud-center/common-scams/auto-renewals.html>.

<sup>48</sup> U.S. DEPT. OF TRANSP., *Enhancing Transparency of Airline Ancillary Service Fees* (Sept. 2022), <https://www.transportation.gov/airconsumer/AirlineAncillaryFeeNPRM>.

<sup>49</sup> Joan Lowy, *DOT Drops Proposal to Force Airlines to Disclose Bag Fees* (Dec. 7, 2017), ASSOC. PRESS, <https://apnews.com/article/2b0d800ccd7641ea9f448fd93006c7be>.

<sup>50</sup> Jeffrey M. Jones, *Americans Revert to Favoring Reduced Government Role*, GALLUP (Oct. 14, 2021), <https://news.gallup.com/poll/355838/americans-revert-favoring-reduced-government-role.aspx>.

<sup>51</sup> *Id.*

<sup>52</sup> *Financial Literacy Annual Report*, CONSUMER FIN. PROT. BUREAU (Mar. 2022), [https://files.consumerfinance.gov/f/documents/cfpb\\_financial-literacy-fy-2021\\_annual-report\\_2022-03.pdf](https://files.consumerfinance.gov/f/documents/cfpb_financial-literacy-fy-2021_annual-report_2022-03.pdf).

<sup>53</sup> See, e.g., Ann Carns, *Apps Try Putting Financial Literacy at Kids' Fingertips*, N.Y. TIMES (Aug. 27, 2021), <https://www.nytimes.com/2021/08/27/business/kids-financial-literacy-apps.html>; Jordan Rosenfeld, *The Top 6 Financial Apps to Help Teens Learn More About Money*, YAHOO.COM (Nov. 30, 2021), <https://www.yahoo.com/now/top-6-financial-apps-help-220115526.html>.

like Truebill, Bobby, and Trim let consumers know their current status on subscriptions and their finances.<sup>54</sup>

Trade associations are another method within the market for enforcing ethical norms. The FTC has noted the importance of industry in self-regulation, including via group advocacy.<sup>55</sup> Trade associations often create codes of conduct to manage ethics standards in their part of the economy.<sup>56</sup> Doing so gives businesses a variety of benefits, including lowering the costs of regulation for their members and potentially improving that industry's reputation for ethical conduct.<sup>57</sup> Yet codes of ethics can also lead to restrictions on competition, especially within the industry itself, such as discouraging price competition and the movement of customers or employees.<sup>58</sup> In general, if done improperly, a code of ethics can make it more difficult to enter these industries in the first place or change industry standards to something fairer or more efficient.<sup>59</sup>

Although trade association ethical norms for subscriptions may appear to be helpful in limiting unethical behavior by its members, the issue may not be limited to specific industries. Improper use of auto-renewals and other hidden fees could be more universal, which may mean that certain industries addressing the problems may not be a sufficient solution. The same survey in Washington discussed earlier in this paper found that consumers did not report running into these concerns with specific individual companies or with certain industries.<sup>60</sup> As a result, trade association codes of ethics governing subscriptions may be useful, but not the most effective route in fixing the issue.

Nonprofit organizations may also be helpful in providing information and offering advocacy to certain demographics that are frequently affected by misleading subscriptions and auto-renewals. For example, the American Association for Retired Persons, or AARP, often takes a central role in educating those above age 55 about consumer protection through their Public Policy Institute.<sup>61</sup>

#### ***D. International Solutions***

Examining how other countries treat subscriptions, especially auto-renewals, can be informative for American policymakers. For example, the United Kingdom in 2022 undertook a substantial review of consumer rights.<sup>62</sup> In evaluating the role of companies in auto-renewal contracts, the Competition & Markets Authority (the British analog to the FTC)<sup>63</sup> focused on the idea of

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<sup>54</sup> See, e.g., Maryalene LaPonsie, *Track and Manage Subscriptions with These 7 Apps*, U.S. NEWS & WORLD REP. (May 18, 2022, 2:33PM), <https://money.usnews.com/money/personal-finance/saving-and-budgeting/articles/track-and-manage-subscriptions-with-these-apps>.

<sup>55</sup> Starek, *supra* note 18.

<sup>56</sup> *Id.*

<sup>57</sup> Mark Katz, *The Ethics of Trade Association Codes of Ethics*, WOLTERS KLUWER COMPETITION L. BLOG (Dec. 19, 2014), <http://competitionlawblog.kluwercompetitionlaw.com/2014/12/19/the-ethics-of-trade-association-codes-of-ethics/>.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> WASH. STATE OFF. OF THE ATT'Y GEN, *supra* note 19.

<sup>61</sup> See AARP Public Policy Institute Issues: *Consumer Protection*, AM. ASS'N OF RET. PERS. (2022), <https://www.aarp.org/ppi/issues/consumer-protection/>.

<sup>62</sup> COMPETITION & MKTS. AUTH., *REFORMING COMPETITION AND CONSUMER POLICY: DRIVING GROWTH AND DELIVERING COMPETITIVE MARKETS THAT WORK FOR CONSUMERS*, 2021, CMA149con, at 35 (UK).

<sup>63</sup> FED. TRADE COMM'N, *Competition and Consumer Protection Agencies Worldwide* (2021), <https://www.ftc.gov/policy/international/competition-consumer-protection-agencies-worldwide#u>.

informed choice: transparency, consent, and pre-contract details were key in its recommendations.<sup>64</sup> Similarly, the CMA's report in 2021 considered the importance of consumer satisfaction and the potential dangers of customer service problems and reputational harm to businesses that engage in often confusing practices like auto-renewal contracts that do not clarify consumer rights at an early point in the relationship.<sup>65</sup>

Before 2015, these general principles were put into operation in the UK by the Enterprise Act 2002.<sup>66</sup> This statute gave the Office of Fair Trading 90 days to respond to a complaint that “appears to be significantly harming the interests of consumers”.<sup>67</sup> This law has since been replaced in part by the Consumer Rights Act 2015, which helped to better organize consumer protection laws that were pieced together from various statutes before its passage.<sup>68</sup> An innovative component of the Consumer Rights Act 2015 is the option for inexpensive access to alternative dispute resolution if a conflict arises between business and consumer.<sup>69</sup>

The CMA has made this more concrete, for example, by pursuing legal action in 2021 against antivirus software company Norton for its lack of information regarding auto-renewals as part of a larger effort in evaluating the practices of the antivirus software industry.<sup>70</sup> Norton has allegedly failed to provide critical data about the sufficiency of notice in both pre-contract and contractual periods, methods given to the customers to cancel their subscriptions, confusion about its sale prices, and attempts to increase the price through a lack of fairness within the substance of the contract itself.<sup>71</sup> The extent of the CMA's power in this situation was to request information, as it does not have the ability to declare a company's practice in violation of the law or to impose fines.<sup>72</sup>

The takeaway from considering the UK's example is that a national model is feasible, and it can even evolve over time. The information-requesting abilities of the CMA could help achieve a balance in the United States if such an approach were adopted here; the court system (either federal or state) could still be responsible for determining fault, but an analogous structure could substantially increase the flow of knowledge about industry and company practices. Doing so could also permit the American government to focus its efforts on specific industries that are problematic for not giving consumers enough information regarding auto-renewals. Germany likewise has taken action to reform its subscription laws. In 2022, Germany revised its limits to auto-renewal of consumer contracts; among its changes include provisions that a consumer can give one month's notice to end an agreement.<sup>73</sup> An intriguing component of the new

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<sup>64</sup> COMPETITION & MKTS. AUTH., *supra* note 62.

<sup>65</sup> *Id.*

<sup>66</sup> Enterprise Act 2002, c. 40, Part 1, § 11 (UK).

<sup>67</sup> *Id.*

<sup>68</sup> Consumer Rights Act 2015, c. 15 (UK).

<sup>69</sup> See The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015, No. 542 (UK).

<sup>70</sup> *CMA Takes Norton to Court for Withholding Information*, COMPETITION & MKTS. AUTH. (Mar. 23, 2021), <https://www.gov.uk/government/news/cma-takes-norton-to-court-for-withholding-information>.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Bürgerliches Gesetzbuch [BGB] [Civil Code], § 309, [https://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html#p0961](https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0961) (Ger.).

laws is the requirement for a “termination button” that clearly shows where a consumer can cancel their contract.<sup>74</sup> This button must be clearly visible and accessible to the consumer.<sup>75</sup>

#### IV. WHAT IS THE BEST SOLUTION?

After examining each of these potential options for addressing ethical issues in the subscription economy, it becomes clear that some combination thereof is needed. Attempts at federal regulation should continue despite the lack of success in doing so at this point. The FTC can continue educating consumers about these risks, with the benefit being that more exposure to the problem (as seen with Colorado’s state legislators) could result in more progress. Market-based solutions, like tools to help consumers monitor their subscriptions, can support this concept. What likely should not continue for a serious length of time is the current distance between state regulations of subscriptions. While within the power of the state governments, it causes confusion for both consumers and businesses alike. A federal solution that works in tandem with industry on preventing consumer harm resulting from subscriptions recognizes that this is a universal problem that exists regardless of one’s state of residence. Doing so also fits neatly with the philosophical foundation of consumer protection: stakeholder theory asks that companies consider all of those individuals, businesses, and society in general that will be affected by unethical ways of obtaining profit. Similar to how the Uniform Commercial Code streamlined commerce between states, a common agreement on regulations could increase transparency and avoid pitfalls like negative options. The United Kingdom’s example of a federal agency taking a more assertive role in information gathering while leaving enforcement to the courts could be useful in alleviating fears of yet another overly powerful federal agency dictating laws to individual states and businesses. As the subscription economy will likely strengthen over time, a modern and flexible approach is definitely needed.

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*