NOTE

ONE SIZE DOES NOT FIT ALL: THE SHORTCOMINGS OF CURRENT NEGATIVE OPTION LEGISLATION

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Introduction

A few short years ago, one article questioned whether 2012 would be the year of subscription-based services.[1] Indeed, subscription-based business models have become increasingly prevalent in recent years.[2] For example, Graze, founded in 2009, delivers a box of healthy snacks to

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[1] Kelly Clay, *Will 2012 Be The Year of Subscription-Based Services?*, Locker Gnome (Jan. 9, 2012), http://www.lockergnome.com/news/2012/01/09/will-2012-be-the-year-of-subscription-based-services/.

[2] *See* Meegan B. Brooks & Stephanie A. Sheridan, *2nd Wave of Auto-Renewal Lawsuits Attack Business Model*, Law360 (Aug. 6, 2015), http://www.law360.com/articles/687618/2nd-wave-of-auto-renewal-lawsuits-attack-business-model.

its customers on a weekly or biweekly basis.[3] Graze customers' subscriptions continue indefinitely until a customer affirmatively cancels.[4] In 2014, Graze saw its sales grow thirty-one percent.[5] Other subscription-based startups offer various goods ranging from razors to groceries.[6]

Another class of subscription-based startups, rather than offering tangible goods, offers services or access to discounts.[7] For example, Tinder—a phone application providing date-matching services—recently limited the free services it offers and added a subscription-based premium option.[8] On the other hand, JustFab.com is an example of a subscription-based startup that offers a personalized shopping experience and access to discounts.[9] The website sells shoes, clothes, and accessories at a discount for its subscribers.[10] In addition, each month it generates a digital "personalized boutique," which contains various items that are selected based on a style quiz taken by the customer and the customer's past shopping preferences.[11] Once a customer makes a purchase from JustFab.com, he or she is enrolled as a member of the website and charged a monthly fee of $39.95.[12] This fee is converted to store credit, which the customer can only use to purchase goods from the website (the customer cannot "cash out" the accumulated store credit).[13]

Negative option marketing lies at the heart of subscription-based business models like those employed by Graze and JustFab.com. In most sales transactions, customers must affirmatively accept an offer in order for a transaction to move forward.[14] However, negative option marketing turns this proposition on its head by assuming that a customer's silence, or failure to affirmatively reject goods or services, constitutes acceptance of an offer.[15] Thus, in order to cancel a transaction,

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3 *See How it Works*, GRAZE (Oct. 17, 2015, 4:29 PM), https://www.graze.com/help/how-it-works; Jon Yeomans, *Graze Boxes Up 31% Sales Growth*, THE GROCER (Sep. 24, 2014), http://www.thegrocer.co.uk/finance/results/graze-boxes-up-31-sales-growth/372023.article.

4 *See How it Works*, *supra* note 3.

5 Yeomans, *supra* note 3.

6 *See* Brooks, *supra* note 2.

7 *See id.*

8 *See* Alyssa Newcomb, *Why Tinder Is Charging People Over 30 More for Tinder Plus*, ABC NEWS (Mar. 2, 2015), http://abcnews.go.com/Technology/tinder-charging-people-30-tinder/story?id=29335809.

9 *See How it Works*, JUSTFAB (Oct. 17, 2015, 4:35 PM), http://www.justfab.com/how-justfab-works.htm.

10 *See id.*

11 *See id.*

12 *See id.*

13 *See id.*

14 *See* Peter Bowal, *Reluctance to Regulate: The Case of Negative Option Marketing*, 36 AM. BUS. L.J. 377, 378 (1999).

15 *See* 16 C.F.R. § 310.2(t) (2010). However, one should note that a customer must take some step to enter into the negative option relationship (for example, by engaging in an initial

subscription, or agreement a customer must exercise a negative option by affirmatively rejecting the transaction, subscription, or agreement.[16] Formally, the Federal Code of Regulations defines negative option marketing as follows: "Negative option feature means, in an offer or agreement to sell or provide any goods or services, a provision under which the customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer."[17]

Negative option marketing may provide benefits to both customers and sellers. Customers might receive the benefit of convenience, or uninterrupted service or product shipments.[18] In addition, to the extent that sellers save money and increase revenue through negative option marketing, sellers can pass on some of the savings to customers in the form of lower prices.[19] On the other hand, sellers potentially benefit from lower costs and increased revenue, which they may achieve through various mechanisms.[20] For example, sellers may be able to stock inventory more efficiently and may be able to avoid renewal costs.[21]

Notably, while negative option marketing is increasingly popular among subscription-based sellers, customer reactions have been mixed.[22] For example, a quick search of "graze box reviews" pulls up links such as "The Best Delivery Snack Packages in the U.S.," while a quick search of "JustFab reviews" pulls up links including "JustFab: Not So Fab After All" and "JustFab's Checkout Tactics Are JustShady."[23] Indeed, JustFab.com was recently involved in several lawsuits questioning its business practices.[24] In one such lawsuit, JustFab.com sued the website

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transaction with the seller). *See* Peter Bowal, *Reluctance to Regulate: The Case of Negative Option Marketing*, 36 AM. BUS. L.J. 377, 381–82 (1999) (stating that contracts cannot be "foisted" upon people, and therefore negative options usually involve an underlying or master contract that has formal mutual consent).

16 *See* Bowal, *supra* note 14, at 378.

17 *See* 16 C.F.R. § 310.2(t).

18 *See* FED. TRADE COMM'N, NEGATIVE OPTIONS: A REPORT BY THE STAFF OF THE FTC'S DIVISION OF ENFORCEMENT 4 (2009), https://www.ftc.gov/reports/negative-options-federal-trade-commission-workshop-analyzing-negative-option-marketing.

19 *See id.* at 5.

20 *See id.* at 3.

21 *See id.* at 3.

22 *See* Brooks, *supra* note 2.

23 Brooke Porter Katz, *The Best Delivery Snack Packages in the U.S.*, SERIOUS EATS (Apr. 16, 2014), http://www.seriouseats.com/2014/04/the-best-delivery-snack-packages-in-us.html; Zuska, *JustFab.com: Not So Fab After All*, LITERALLY, DARLING (Jan. 10, 2014), http://www.literallydarling.com/blog/2014/01/10/justfab-not-so-fab/#; Alexia Tsotsis, *JustFab's Checkout Tactics Are JustShady*, TECHCRUNCH (Sep. 27, 2013), http://techcrunch.com/2013/09/27/not-so-vip/.

24 *See* Catherine Shu, *Fab.com Files Counterclaim Against JustFab, Says JustFab is a "Predatory" Bargain Clothing Peddler*, TECHCRUNCH (Nov. 1, 2013), http://techcrunch.com/2013/11/01/fabcounterclaim/; Press Release, Santa Clara District Attorney's Office, *Online*

Fab.com for trademark infringement and Fab.com countersued, claiming that JustFab.com's "questionable business practices" had injured Fab.com's own reputation.[25] Later, after racking up thousands of Better Business Bureau complaints, JustFab.com paid $1.8 million to settle a class action lawsuit alleging that the company had misled customers into agreeing to subscriptions.[26] Significantly, these lawsuits reflect a larger trend.[27] The end of 2014 and early-2015 saw a wave of similar class action lawsuits targeting subscription-based businesses that utilize negative option marketing.[28]

Recently, legislators have attempted to address the growing use of negative option marketing and corresponding customer concerns.[29] Specifically, in both the Restore Online Shoppers' Confidence Act and the Telemarketing Sales Rule, legislators enacted broad provisions regulating negative option marketing.[30] Each provision requires sellers to provide thorough disclosure and an easy method of cancellation when using negative option marketing schemes.[31] In addition, both provisions work to provide a broad base of consumer protection by widely applying to all forms of negative option marketing.[32]

However, several questions remain. Why are customers okay with certain negative option marketing schemes, like Graze, while they feel defrauded by others, like JustFab.com? Moreover, why do customers continue to feel defrauded by companies like JustFab.com given the protections afforded by the Restore Online Shoppers' Confidence Act and the Telemarketing Sales Rule? This Note addresses these questions with a focus on subscription-based businesses, which make up a large portion of the negative option marketing schemes that we see today. In particular, this Note argues that certain subscription-based businesses have a greater potential than other businesses to become predatory. In taking a "one-size-fits-all" approach and treating all negative option marketing schemes in the same manner, current negative option legislation fails to address this reality.

Specifically, subscriptions offering services or discounts, as opposed to tangible goods, pose unique dangers to customers and to the

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Fashion Retailer Pays Over $1.8 Million to Settle Consumer Protection Lawsuit for Misleading Advertising (Oct. 24, 2014), https://www.sccgov.org/sites/da/newsroom/newsreleases/Pages/NRA2014/Online-Fashion-Retailer-Pays-Over-$1-8-Million-to-Settle-Consumer-Protection-Lawsuit-For-Misleading-Advertising.aspx.

25 *See* Shu, *supra* note 24.

26 *See* Santa Clara District Attorney's Office, *supra* note 24.

27 *See* Brooks, *supra* note 2.

28 *See id.*

29 *See* 15 U.S.C. § 8403 (2012); 16 C.F.R. § 310 (2015).

30 *See* legislation cited *supra* note 29.

31 *See id.*

32 *See id.*

marketplace. These unique dangers result largely from the fact that a customer usually has to take some type of affirmative action to receive the benefit of services or discounts offered through a subscription. Where a customer does not periodically receive a tangible good as part of a subscription, that customer is more likely to forget about the subscription and consequently fail to take any action to access its services or discounts. Thus, in a subscription offering services or discounts, customers can potentially pay hundreds or thousands of dollars for services or discounts that they never access. As a result, the consequences of consumer inertia, or the tendency of consumers to continue in a given pattern of consumption, can be potentially devastating.

Because of these dangers, this Note suggests that consumers should have the benefit of added legal protection with regard to subscriptions offering services or access to discounts. Specifically, subscriptions offering services or discounts should not be allowed to continue or automatically renew in perpetuity. Rather, after a period of disuse, the neglected subscription should terminate unless the customer takes measures to affirmatively renew the subscription.[33] This outcome is appropriate given that prolonged disuse tends to serve as a signal, for the given transaction and customer, that the benefits of negative option marketing are outweighed by its costs. In addition, prolonged disuse may serve as a signal that the business relationship has become predatory.

Part I discusses early forms of negative option marketing and early negative option marketing legislation. Next, Part II describes how the marketplace has recently evolved to include a growing number of subscription-based businesses. Part II then goes on to provide an overview of legislative responses to the increase in subscription-based businesses. In Part III, this Note shows how these legislative responses leave a regulatory gap regarding the dangers associated with subscription-based businesses offering services and discounts. Finally, Part IV describes a potential solution.

I. EARLY NEGATIVE OPTION MARKETING

Negative option marketing first appeared in the American marketplace in the form of book-of-the-month clubs.[34] In 1926, Sackheim and

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[33] Because many payments today are automatic and electronic, affirmative renewal should constitute more than simply paying a credit card charge. *See* 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) ("Every day, firms use automatic selling and preauthorized payments to force buyers into making purchases they don't really want."). On the other hand, such affirmative renewal could be as simple as clicking a link provided via email.

[34] *See* Owen R. Phillips, *Negative Option Contracts and Consumer Switching Costs*, 60 S. ECON. J. 304, 304 (1993).

Scherman developed a Book-of-the-Month Club (the "Club"), one of the first such clubs of its kind to emerge.[35] Under Sackheim and Scherman's original business model, the Club sent a new book to its customers each month.[36] Customers could return the Club's book selection (with postage paid by the Club) if they were unsatisfied.[37] In 1947, to save postage and return costs, the Club began sending a card to each of its customers announcing the book selection of the month.[38] If a customer did not wish to receive the selection, he or she could return the card to the Club.[39] If a customer did not return his or her card, the Club would proceed to send the customer that month's book selection and charge the customer.[40]

This business model was later adopted in various other industries, and book, recording, and video clubs became increasingly popular.[41] The Federal Trade Commission ("FTC") describes the form of negative option marketing utilized by these clubs as a "pre-notification negative option plan."[42] Under such a plan, a seller periodically sends notices offering goods.[43] If a customer does not take action to decline the offered good, the seller will proceed to send the good and charge the customer.[44] Notably, pre-notification negative option plans apply only to businesses offering goods rather than services.[45]

While pre-notification negative option plans and other early forms of negative option marketing offered potential benefits to both customers and sellers,[46] the plans also left the door open to potential abuse by predatory sellers.[47] For example, sellers in the 1970s commonly sent unsolicited merchandise to customers who had not entered into any type of formal agreement with these sellers.[48] If customers did not return the

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35 *See* ENCYCLOPEDIA OF WHITE COLLAR CRIME 195 (Jurg Gerber & Eric L. Jensen eds., 2007).

36 *See id.*

37 *See id.*

38 *See* Bowal, *supra* note 14, at 378–79.

39 *See id.*

40 *See id.*

41 *See id.*; ENCYCLOPEDIA OF WHITE COLLAR CRIME, *supra* note 35, at 195; Phillips, *supra* note 34, at 304.

42 *See* FED. TRADE COMM'N, *supra* note 18, at i.

43 *See id.*

44 *See id.*

45 *See id.* ("[I]n prenotification negative option plans, such as book or music clubs, sellers send periodic notices offering *goods*. If consumers take no action, sellers send *the goods* and charge consumers.") (emphasis added).

46 *See* FED. TRADE COMM'N, *supra* note 18, at 3–5.

47 Customers may be "vulnerable to 'opportunistic offers with a very high price or with poor terms'" because of the fact that they lack bargaining power in negative option transactions. *See id.* at 5 (quoting Professor Avery Katz of Columbia Law School).

48 *See* J.M.S., *Legislative Note: The Unsolicited Gift Act*, 39 TENN. L. REV. 201, 201–03 (1971).

unsolicited merchandise—if they "in any way accepted delivery and exercised dominion over these goods"—sellers would proceed to charge them for the goods.[49] In fact, one Note from the 1970s stated that sending unsolicited merchandise as a means of procuring sales was a "widespread problem."[50]

In response to the problem of unsolicited merchandise, Congress enacted section 3009 of the United States Code in 1970.[51] Section 3009 regulates the mailing of unordered merchandise, and states that recipients may treat unordered merchandise as a gift.[52] Thus, where a customer has not formally entered into a negative option agreement with a seller and the seller sends the customer unsolicited merchandise, the customer may keep the merchandise for free and do with it as he or she pleases.[53] In response to abuses of pre-notification negative option plans, the Federal Trade Commission enacted Section 425 of the Code of Federal Regulations in 1973.[54] Section 425 provides specific rules that limit sellers utilizing pre-notification option plans.[55] For example, sellers must review clearly and conspicuously the material terms of the plan, and they cannot substitute merchandise for that ordered by a customer without the customer's consent.[56] These statutes successfully regulated unsolicited merchandise and pre-notification negative option plans.[57]

II. THE RISE OF THE SUBSCRIPTION ECONOMY

A. *The Subscription Economy*

The negative option landscape of today looks dramatically different than that of the 1970s.[58] In particular, negative option schemes have

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49 *See id.* at 201.

50 *See id.* at 202–03; 39 U.S.C. § 3009 (1971) (regulating unsolicited merchandise); 16 C.F.R. § 425 (1973) (regulating pre-notification negative option plans).

51 *See* 39 U.S.C. § 3009.

52 *See id.*

53 *See id.*; DAVID H. BERNSTEIN & BRUCE P. KELLER, THE LAW OF ADVERTISING, MARKETING AND PROMOTIONS § 8.02 (Law Journal Press 2015).

54 *See* 16 C.F.R § 425.

55 *See id.*

56 *See id.*

57 Bruce A. Craig, *Negative Option Billing—Understanding the Stealth Scams of the 90s*, 7 LOY. CONSUMER L. REV. 5, 6 (1994) ("Since regulation, [pre-notification negative option] plans have not had a significant adverse impact on consumers."); Dennis D. Lamont, *Negative Option Offers in Consumer Service Contracts: A Principled Reconciliation of Commerce and Consumer Protection*, 42 UCLA L. REV. 1315, 1322 (1995) ("Once Congress and the [Federal Trade Commission] responded to initial complaints, there appeared a consensus that the 'problems' of negative options had been solved, and for practical purposes they were with respect to merchandising.").

58 *Compare* Kyle Hutzler, *The Rise of the Subscription Economy*, HUFFINGTON POST, BUSINESS (Jan. 8, 2014), http://www.huffingtonpost.com/kyle-hutzler/rise-of-the-subscription-economy_b_4548866.html (describing the rise of the "subscription economy") *with* Phillips, *supra* note 34, at 304 (describing early forms of negative option marketing, which largely

become increasingly prevalent.[59] This proliferation was made possible in large part by the rise of the Internet and the development of electronic billing, both of which make the execution of negative option schemes easier than ever before.[60] The Internet allows companies to market to many consumers at once.[61] Electronic billing then enables companies to more easily collect customers' billing information, store this information, and access their accounts.[62] Furthermore, the online behavior of consumers tends to facilitate transactions that a consumer may otherwise be reluctant to enter.[63] For example, the FTC found that those using the Internet commonly exhibit characteristics including unwarranted confidence, exuberance, and a desire for immediate gratification.[64] Particularly troubling is the finding that online consumers tend to be "click happy," meaning that they fail to read or understand agreements that they enter into.[65]

With negative option marketing schemes easier to execute than ever before, such schemes have become not only more numerous but also more varied.[66] Today, the FTC recognizes four broad categories of negative option schemes.[67] Pre-notification negative option plans are the model used by various book, video, and recording clubs.[68] Continuity plans describe negative option marketing schemes in which a customer agrees ahead of time to receive periodic shipments of goods or provisions of services.[69] The customer will continue to receive these goods or services until he or she affirmatively cancels the agreement.[70] Automatic renewal plans describe negative option marketing schemes in which sellers automatically renew a customer's subscription until the customer affirmatively cancels the subscription.[71] Finally, under free-to-pay plans,

consisted of pre-notification negative option plans in the form of book, video, and recording clubs).

59 *See* Brooks, *supra* note 2.

60 *See* Stancil, *supra* note 33, at 109, 123 (noting that automatic selling, which the article equates with modern negative-option billing, "thrives online"); *id.* at 106, 130 (noting that negative option schemes frequently rely on preauthorized payment schemes perpetuated through electronic billing).

61 *See id.* at 109; Bowal, *supra* note 14, at 390.

62 *See* Stancil, *supra* note 33, at 106 ("Today, [negative options are] facilitated by preauthorized debit and credit payments, which enable merchants to obtain payments with virtually no participation from consumers whatsoever.").

63 *See* FED. TRADE COMM'N, *supra* note 18, at 7.

64 *See id.*

65 *See id.*

66 *See id.* at 2 (describing four different types of plans that fall within the negative option marketing category).

67 *See id.*

68 *See id.* at i.

69 *See id.*

70 *See id.*

71 *See id.*

sellers provide goods or services for free (or a nominal fee) during a trial period.[72] After this trial period, sellers begin to charge a fee until the customer affirmatively cancels the agreement.[73]

As a result of the increased prevalence and variety of negative option schemes, today's consumers are much more likely to be involved in or affected by such a scheme, predominately via a subscription-based business.[74] Commentators have described this phenomenon as "the subscription economy," and have noted that today's consumers are "drowning in digital subscriptions."[75] In today's subscription economy, items ranging from software to groceries are offered in the form of periodic subscriptions.[76] For example, The Dollar Shave Club, which delivers new, high-end razors to customers on a monthly basis, exemplifies how today's consumers can (and do) buy almost anything in the form of a monthly subscription.[77] Notably, as subscription-based businesses become increasingly popular, they have tended to displace their non-subscription-based predecessors.[78] This trend is evident, for example, in the rise of Netflix and the corresponding decline of Blockbuster.[79] However, as more consumers come into contact with subscription-based businesses, the potential dangers unique to these businesses become all the more palpable.

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72 *See id.*

73 *See id.*

74 *See* Hutzler, *supra* note 58.

75 *See id.*; Tien Tzuo, *The Subscription Economy: A Business Transformation*, MEDIUM (Mar. 10, 2015), https://medium.com/@tientzuo/the-subscription-economy-a-business-transformation-83d6fb24a2f9#.v5do3wp9h; Bennett Voyles, *The Subscription Economy: Why Subscriptions Are More Popular Than Ever*, CKGSB KNOWLEDGE (Jun. 17, 2015), http://knowledge.ckgsb.edu.cn/2015/06/17/marketing/the-subscription-economy-why-subscriptions-are-more-popular-than-ever/; Josh Jennings, *You Can't See It All: Subscriptions In Theory and Practice*, SYDNEY MORNING HERALD (Sept. 30, 2015), http://www.smh.com.au/digital-life/digital-life-news/you-cant-see-it-all-subscriptions-in-theory-and-practice-20150922-gjsri3.html.

76 *See* Hutzler, *supra* note 58.

77 *See* Adam Lashinsky, *The Cutting Edge of Care*, FORTUNE (Mar. 9, 2015), http://fortune.com/2015/03/09/dollar-shave-club/.

78 *See* Hutzler, *supra* note 58 (describing how subscription-based businesses are edging out traditional businesses in areas such as software, music, and automobiles). For example, commentators have predicted that enterprise resource planning software, which companies sell under a traditional positive option, "buy once" plan, will soon be displaced by SaaS (software as a service, offered on a subscription-basis); *see, e.g.*, Megan O'Neill, *How Netflix Bankrupted and Destroyed Blockbuster*, BUS. INSIDER (Mar. 1, 2011), http://www.businessinsider.com/how-netflix-bankrupted-and-destroyed-blockbuster-infographic-2011-3 (describing Netflix's displacement of Blockbuster); Victor Luckerson, *Spotify and YouTube are Just Killing Digital Music Sales*, TIME, BUSINESS (Jan. 3, 2014), http://business.time.com/2014/01/03/spotify-and-youtube-are-just-killing-digital-music-sales/ (describing how music streaming through companies like Spotify is displacing digital purchases of music).

79 *See* O'Neill, *supra* note 78.

B. A Response to the Subscription Economy: New Negative Option Legislation

As negative option schemes grew increasingly commonplace and varied, one thing became clear: the specific, targeted regulations of the 1970s no longer provided adequate protection to consumers.[80] These regulations only applied to two specific types of negative option marketing: pre-notification negative option plans and unsolicited merchandise.[81] In order to fill the regulatory gaps created by the growing negative option marketplace and new forms of negative option marketing, the FTC and Congress enacted two new pieces of legislation.[82] The Telemarketing Sales Rule, enacted by the FTC in 1995, applies to all forms of negative option marketing when such marketing occurs over the telephone.[83] Section 8403 of the Restore Online Shoppers' Confidence Act, enacted in 2010 by Congress, applies to all forms of negative option marketing when such marketing occurs on the Internet.[84] Notably, several states have also followed suit, adopting new statutes that further regulate negative option marketing to varying degrees.[85]

The Telemarketing Sales Rule, section 8403, and many state laws targeting negative option schemes all share a common approach to the regulation of negative option schemes.[86] Specifically, each of these laws and regulations focus on disclosure.[87] Companies engaged in negative option marketing schemes must "clearly and conspicuously" disclose the material terms of negative option transactions.[88] Examples of material terms requiring disclosure include whether a customer's card will be charged periodically, the frequency and duration of recurring charges, when customers must cancel a transaction to avoid recurring charges, and how customers may cancel transactions.[89] Furthermore, disclosures

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80 *See* Mark T. Spriggs & John R. Nevin, *Negative Option Plans: Current Forms Versus Existing Regulations*, 15 J. OF PUB. POL'Y & MARKETING 227, 236 (1996) (suggesting various policy recommendations in response to new forms of negative option selling (prior to the enactment of the Telemarketing Sales Rule and section 8403)).

81 *See* 39 U.S.C. § 3009 (2012); 16 C.F.R § 425 (2015).

82 *See* 16 C.F.R. § 310 (2015); 15 U.S.C. § 8403 (2012).

83 *See* 16 C.F.R. § 310.

84 *See* 15 U.S.C. § 8403.

85 *See* Brooks, *supra* note 2.

86 Most of these regulations require clear and conspicuous disclosure of the material terms in a negative option agreement. *See id.*; 16 C.F.R. § 310; 15 U.S.C. § 8403.

87 *See* Brooks, *supra* note 2 (noting that state statutes vary in strictness but "generally require companies to disclose automatic renewal policies in a clear and conspicuous manner"); 16 C.F.R. § 310 (requiring disclosure of "all material terms and conditions" of a negative option feature marketed or sold over telephone); 15 U.S.C. § 8403 (requiring disclosure of "all material terms" of negative option transactions effected on the Internet).

88 *See* Brooks, *supra* note 2; 16 C.F.R. § 310; 15 U.S.C. § 8403.

89 *See* FTC v. Health Formulas, LLC, No. 2:14-cv-01649-RFB-GWF (D. Nev. 2015) (order granting preliminary injunction).

must be "unavoidable" in order to be clear and conspicuous.[90] For example, in print communications, disclosures must stand out from accompanying text because of type size, location, or other characteristics.[91]

III. THE SHORTCOMINGS OF CURRENT NEGATIVE OPTION LEGISLATION

While the Telemarketing Sales Rule and section 8403 are a step in the right direction in terms of providing increased protection to consumers, a regulatory gap remains. This gap is evident in a recent wave of lawsuits aimed at subscription-based businesses, and serves to demonstrate increasing consumer dissatisfaction with the deceptive market practices of these businesses.[92] These lawsuits initially targeted the music and gaming industries.[93] However, by 2014, the scope of targeted industries expanded to include other service-based subscription companies such as SeaWorld Entertainment, Inc., AAA Inc., Blizzard Entertainment Inc., and Tinder Inc.[94] In addition, in 2014, the FTC brought actions for the first time under section 8403, demonstrating its increased motivation to enforce the Restore Online Shoppers' Confidence Act's negative option provision and suggesting more such lawsuits to come.[95]

Perhaps most telling is the fact that consumers remain dissatisfied with certain companies even when these companies disclose the nature of a negative option transaction.[96] For example, in 2014 JustFab.com settled a class action lawsuit founded upon allegations that the company misled customers about subscription fees.[97] Pursuant to this settlement, JustFab.com revised its disclosure policies to make it clearer that customers were entering into a subscription. However, customer complaints about the company's marketing practices continued to pour into the Better Business Bureau and the FTC, alleging insufficient notice of the negative option agreement. As a result, JustFab.com recently announced that it is again "reviewing its tactics and customer service practices."[98]

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90 *See id.*

91 *See id.*

92 *See* Brooks, *supra* note 2.

93 *See id.*

94 *See id.*

95 *See* Benjamin Stein, *FTC Brings First Actions Under the Restore Online Shoppers' Confidence Act*, INFO. L. GROUP (Nov. 3, 2014), http://www.infolawgroup.com/2014/11/articles/ftc/ftc-brings-first-actions-under-the-restore-online-shoppers-confidence-act/.

96 *See, e.g.*, Kim Bhasin, *JustFab is Reviewing Customer Service Practices as Complaints Pile Up*, BLOOMBERG BUS. (Oct. 30, 2015), http://www.bloomberg.com/news/articles/2015-10-30/justfab-is-reviewing-customer-service-practices-as-complaints-pile-up (noting that JustFab has continued to receive a barrage of customer complaints even after settling a class action lawsuit regarding its misleading advertising practices).

97 *See id.*

98 *See id.*

Other recent lawsuits have also featured subscription-based businesses that appear to disclose the negative option nature of a transaction and to provide easy methods of cancellation.[99] This trend implies that current laws do not provide adequate protection to consumers, who continue to feel defrauded despite the provision of disclosure and cancellation methods.[100]

The Telemarketing Sales Rule and section 8403 ultimately fail to provide adequate protection to consumers in today's negative option market precisely because they treat all negative option schemes in the same manner. As a result of this one-size-fits-all approach, the Telemarketing Sales Rule and section 8403 fail to account for the fact that some forms of negative option marketing have a greater potential than others to become abusive or predatory through their reliance on consumer inertia. This section explores the shortcomings of these regulations by examining the role of consumer inertia in negative option schemes generally and the enhanced potential for the exploitation of consumer inertia present in subscriptions involving services or discounts.

A. *The Role of Consumer Inertia in Negative Option Schemes*

All negative option schemes have the potential to become predatory.[101] Under traditional business models, customers must affirmatively consent to every transaction that takes place between themselves and a company.[102] Under negative option schemes, customers, through an initial decision to enter into a negative option agreement, allow companies to assume that silence constitutes acceptance of offers made by the company.[103] Thus, in negative option schemes, customers give up some of their authority to affirmatively approve individual transactions.[104] The potential problem with this change of control—from consumer to company—lies in the fact that companies are self-interested.[105] Simply put, consumers are imparting additional control over the charging of their accounts to companies with potentially adverse interests.[106] In this man-

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99 *See* Brooks, *supra* note 2.

100 *See* Stancil, *supra* note 33, at 129 ("One doesn't need to conduct a detailed investigation into regulations affecting automatic selling to deem them inadequate . . . .").

101 *See id.* at 125 (describing how negative option plans "[place] consumers at [a] disadvantage, and directly [incentivize] bad behavior by sellers").

102 *See* Spriggs, *supra* note 80, at 228.

103 *See id.* at 228, 231.

104 *See* Bowal, *supra* note 14, at 378–79 (describing how negative option marketing transforms a transaction from one in which the consumer controls the offer to one in which the seller has the upper-hand).

105 *See* Stancil, *supra* note 33, at 117 (stating that the competing interests of consumers and companies "mean that merchants are rewarded for obstructing customers").

106 *See id.*

ner, the very structure of negative option agreements opens the door to potentially predatory and abusive behavior by companies.[107]

One of the main ways in which this shift in control encourages abusive practices is through the exploitation of consumer inertia.[108] Consumer inertia describes the tendency of consumers to continue in a given pattern of consumption.[109] According to one definition, consumer inertia is "a failure to take action when more careful assessment of the situation would lead to action."[110] Thus, consumer inertia means that consumers often choose the "do nothing" option rather than an option requiring action.[111] Under negative option schemes, in contrast to traditional transactions, the "do nothing" option results in a sale.[112] As a result, subscription-based companies actually bet on high rates of inertia, and this bet has proven to be a fruitful one.[113] For example, a study of seventy-two telephone companies found that sales of services were thirty-five percent higher when these services were offered under a negative option scheme, as compared to when customers had to affirmatively order these services.[114]

Unfortunately, in encouraging the exploitation of consumer inertia, negative option schemes encourage economically inefficient transactions.[115] The very definition of consumer inertia states that consumers would take action given "a more careful assessment of the situation."[116] This definition implies that, by failing to take action due to consumer inertia, consumers are choosing the less-favorable or less-efficient path.[117] Thus, when negative option schemes exploit consumer inertia,

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[107] *See id.* at 125 ("[A]utomatic selling . . . creates opportunity for unscrupulous merchants. Its economic characteristics can be exploited to burden consumers with unsought purchases and invisible payments. This practice fundamentally alters the way transactions occur, placing consumers at an inherent disadvantage, and directly incentivizing bad behavior by sellers.").

[108] *See* Cass R. Sunstein, *Deciding By Default*, 162 U. PA. L. REV 1, 37–38 (2013).

[109] *See* BARRY BABIN & ERIC HARRIS, CONSUMER BEHAVIOR 317 (Cengage Learning, 7th ed. 2016).

[110] *See* FIN. CONDUCT AUTH., ENCOURAGING CONSUMERS TO ACT AT RENEWAL: EVIDENCE FROM FIELD TRIALS IN THE HOME AND MOTOR INSURANCE MARKETS 7 (2015).

[111] *See* MARTIN J. EVANS, LISA O'MALLEY & MAURICE PATTERSON, EXPLORING DIRECT & CUSTOMER RELATIONSHIP MARKETING 278 (Thomson, 2nd ed., 2001).

[112] *See id.*

[113] *See* Hutzler, *supra* note 58.

[114] *See* Lamont, *supra* note 57, at 1330–31 (*citing* FEDERAL COMMUNICATIONS COMMISSION, INSIDE WIRE SURVEY (1988) (compiled by Mr. Thomas Petras, Accounting & Audit Division, Common Carrier Bureau, Federal Communications Commission)).

[115] Through such exploitation, buyers might enroll in a negative option plan even where the selling price of the plan is higher than the buyer's reservation price (the highest price that the buyer is otherwise willing to pay). In this manner, "the seller sells a product that would not have sold in a positive option system." *See* Spriggs, *supra* note 80, at 227–28.

[116] *See* FIN. CONDUCT AUTH., *supra* note 110, at 7.

[117] *See* Spriggs, *supra* note 80, at 227–28.

consumers inevitably are at risk of paying for goods or services that they do not want, do not use, and would otherwise not have chosen to purchase.[118] As a result, consumers are deprived of funds that they otherwise could have used in a more efficient or utility-maximizing manner.[119]

Furthermore, consumer funds are allocated inefficiently to companies.[120] Rather than being allocated to companies based upon the quality or utility of the goods and services they provide, the exploitation of consumer inertia encourages the allocation of funds to companies based upon the structure of a given transaction.[121] Companies will inevitably have less incentive to develop or maintain the quality of the goods and services that they provide where the structure of a transaction is the primary force driving sales. As a result, more time and money will be spent developing business models that can capitalize on consumer inertia and less will be expended on research and development. Adding insult to injury, this time and money will likely be spent developing the "sneakiest" business model possible (with the least notice, disclosure, etc.) that is still within compliance of the law.

B. The Unique Dangers of Negative Option Schemes Involving Services and Discounts

As discussed above, current laws have gone a long way toward addressing some of these concerns.[122] However, these laws fail to recognize that one particular category of negative option agreements poses special dangers.[123] Specifically, under subscriptions involving services or discounts, the validity of "silence as acceptance" is questionable. In order for silence to constitute acceptance, as it does under negative option agreements, one of four circumstances should occur:

- The buyer receives benefits that imply acceptance.
- The buyer takes or retains possession of property.
- Previous dealings indicate that silence or inaction is acceptance.

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[118] *See* Stancil, *supra* note 33, at 125.

[119] Consumers maximize utility when their reservation price equals a product or service's selling price. *See* LOUIS PHLIPS, THE ECONOMICS OF PRICE DISCRIMINATION 218 (Cambridge University Press, 2nd ed., 1981).

[120] *See* Spriggs, *supra* note 80, at 236 (noting that negative option plans can be anticompetitive).

[121] *See supra* note 114 (describing a study in which sales of the same type of services were forty-five percent higher when offered under a negative option plan).

[122] *See, e.g.*, 39 U.S.C. § 3009; 16 C.F.R § 425; 16 C.F.R. § 310; 15 U.S.C. § 8403.

[123] Both the Telemarketing Sales Rule and Section 8403 fail to distinguish between different types of negative option agreements. *See* 16 C.F.R. § 310; 15 U.S.C. § 8403. Specific regulations do exist, but so far these only target pre-notification plans, unsolicited merchandise, and the cable industry. *See* 39 U.S.C. § 3009; 16 C.F.R § 425; 47 C.F.R. § 76.981.

- The seller indicates that acceptance may be communicated by silence or inaction, and the buyer, in remaining silent or inactive, intends to accept the offer.[124]

Each of these circumstances relies on the assumption that a consumer is aware that an exchange has occurred.[125]

While the Telemarketing Sales Rule and Section 8403 require proper disclosure of the material terms of a negative option agreement, this disclosure does not automatically result in consumer awareness of the exchange.[126] In today's marketplace, consumers, particularly those online, often fail to read and fully understand the terms of transactions that they enter into.[127] In subscriptions involving tangible goods, the danger that a consumer may fail to read the terms of a transaction and thus may fail to realize that an exchange has occurred is partially mitigated by the fact that a consumer receives periodic shipments of goods.[128] Acceptance of these shipments should serve to put the consumer on notice of the subscription.[129] In contrast, in subscriptions involving services or discounts, the consumer does not receive physical reminders of the subscription and the potential for this consumer to remain unaware of the transaction remains untempered.[130]

This lack of consumer awareness exacerbates the potential exploitation of consumer inertia, with potentially devastating consequences.[131] Because customers are more likely to forget about a subscription involving services or discounts, they will be less likely to take any type of

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124 *See* Spriggs, *supra* note 80, at 231 (citing RESTATEMENT (SECOND) OF CONTRACTS (1981)).

125 *See id.*

126 *See* 16 C.F.R. § 310; 15 U.S.C. § 8403.

127 *See* MARGARET J. RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 7–8 (Princeton University Press, 2013); FED. TRADE COMM'N, *supra* note 18, at 7.

128 The case in which a consumer unwittingly agrees to the terms of a negative option agreement and then accepts deliveries of goods pursuant to the agreement should be contrasted with the case in which a consumer accepts deliveries of unsolicited merchandise. In the latter case, a special law overrides the presumption that silence constitutes acceptance where a buyer takes or retains possession of property. *See* 39 U.S.C. § 3009.

129 For example, in pre-notification plans, consumers receive periodic announcements preceding each delivery. *See* FED. TRADE COMM'N, *supra* note 18, at 5. These periodic notices may be one of the reasons why consumers complain less about pre-notification plans than about other forms of negative option marketing. *See id.*

130 For example, one couple found they were subscribed to over 20 services that they did not use. *See* Emma Johnson, *This Couple Wasted $7,500 on Unused Subscriptions in 18 Months*, FORBES, PERSONAL FINANCE (Sept. 4, 2015), http://www.forbes.com/sites/emmajohnson/2015/09/04/this-couple-wasted-7500-on-unused-subscriptions-in-18-months/#2715e4857a0b6a7b055149df.

131 *See* Bowal, *supra* note 14, at 379–80 (noting that where consumers do not fully understand what they have agreed to, debts may "continue to accrue longer than the consumer expected").

affirmative action to cancel these subscriptions.[132] As a result, customers are more likely to accrue tens, hundreds, or thousands of dollars in charges for services that they never used or for access to discounts that they never applied.[133] In a sense, these customers have received something for their money—the *potential* to access services or discounts. The law recognizes this potential to access services or discounts as valid consideration.[134] However, when consumers end up spending thousands of dollars on services or discounts that they never use, one must ask: given the realities of consumer behavior and the tendency to forget, should consumers be able to bargain away a commitment to pay for essentially nothing in return?[135]

IV. A SOLUTION

A. *Should the Law Interfere?*

Given that current laws and regulations appear to leave a gap in consumer protection against the most predatory negative option schemes, the question becomes whether, and how, the law should address this gap. Freedom of contract principles may suggest that the law should not interfere where a consumer and a company have voluntarily entered into a subscription.[136] Arguably, by initially consenting to a subscription, consumers have manifested their judgment that such an agreement is in their best interest. One might argue that courts, and companies should not

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[132] A study by the Financial Conduct Authority found that improved renewal notices *did* prompt consumers to switch or negotiate automatically-renewing policies. *See* FIN. CONDUCT AUTH., *supra* note 110, at 3.

[133] One study found that almost half of the population in the United Kingdom admits to paying for at least one subscription that they are not using. *See* Alex Wellman, *Brits Splashing £338 Million a Month on "Forgotten" Gym Memberships and TV Streaming Sites* (May 11, 2015), http://www.mirror.co.uk/news/uk-news/brits-splashing-338-million-month-5678688.

[134] In these cases, the seller has promised to provide a service or discount that the seller is not otherwise obligated to provide in exchange for the return-promise of the buyer to pay. *See* RESTATEMENT (SECOND) OF CONTRACTS (1981).

[135] Not only do consumers have a tendency to forget, but also a tendency to forget *that* they forget. *See* Keith M. Marzilli Ericson, *Forgetting We Forget: Overconfidence and Memory*, 9 J. EUR. ECON. ASSOC. 43, 43 (2011). The scenario described here might be compared to other scenarios in which consumers pay but do not necessarily receive a tangible benefit in return. For example, in real estate option contracts, a consumer might pay for the option to buy a piece of land but decide not to exercise the option. *See* Craig Donofrio, *Who Really Needs A Real Estate Option Contract?*, REALTOR.COM (Mar. 16, 2015), http://www.realtor.com/advice/buy/basics-of-real-estate-option-contracts/. However, real estate options are distinguished from the negative option scenarios described above in that they usually involve a predetermined price (rather than ongoing, periodic charges) and a piece of property desired for its unique characteristics. *See id.* Thus, the consumer behaviors that present a danger in negative option agreements (such as forgetfulness) are not as much of a problem in scenarios such as real estate options.

[136] By definition, freedom of contract is the freedom of parties to create the terms of an agreement without interference from the government. *See* LEGAL INFO. INST., WEX (Jan. 5, 2016, 7:00PM), https://www.law.cornell.edu/wex/freedom_of_contract.

substitute their judgment for a consumer's initial assertion that such an agreement is beneficial. Perhaps it should be up to consumers to monitor subscriptions that they have voluntarily entered into and to cancel agreements that no longer benefit them.[137] In this vein, recall that section 8403 requires negative option marketing that occurs over the Internet to provide for a simple method of cancellation.[138]

However, these arguments ignore the realities of consumer behavior and the disparity in bargaining power between consumers and companies.[139] As described above, consumer habits, such as consumer inertia and click-happiness, tend to diminish a consumer's bargaining position.[140] In addition, modern companies retain significant power over defining the terms of a transaction.[141] Contracts are more often composed of boilerplate terms chosen by the seller and are less often the product of negotiation between equal parties.[142] Realistically, consumers are unable to change or omit unfavorable terms, and the only option for avoiding these terms becomes abstaining from the transaction altogether.[143] Even abstention may be impossible where there are few or no alternative providers, and in such cases the cost of walking away from an unfavorable contract may exceed the cost of signing (especially given that the monetary cost of goods and services is usually deferred and paid via credit). The combination of these factors suggests that when making the initial decision to enter into a negative option agreement, consumers are not necessarily manifesting their judgment that the agreement is in their best interest.

As a result of the disparity in bargaining power, precedent leans in favor of regulation. Laws have often restricted freedom of contract in the pursuit of public policy.[144] In fact, courts increasingly interpret contracts in a manner meant to protect the reasonable expectations of con-

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137 In fact, there are now companies devoted to helping consumers monitor and cancel subscriptions. *See* Nick Statt, *Trim Seeks Out and Destroys Awful Monthly Subscriptions*, THE VERGE (Dec. 20, 2015), http://www.theverge.com/2015/12/20/10597788/trim-subscription-canceller-forgotten-bills-texts.

138 *See id.*

139 *See* FED. TRADE COMM'N, *supra* note 18, at 7 (describing characteristics commonly exhibited by online consumers); Bowal, *supra* note 14, at 378 (describing the disparity in bargaining power that exists between consumers and companies in today's marketplace).

140 *See* FIN. CONDUCT AUTH., *supra* note 110, at 7; FED. TRADE COMM'N, *supra* note 18, at 7. In particular, consumers are overconfident that they can fix any problems that they may encounter in the future, for example by canceling an agreement in the case of negative option agreements.

141 *See* Bowal, *supra* note 14, at 378.

142 *See id.*

143 *See id.*

144 *See* Mark Pettit, Jr., *Freedom, Freedom of Contract, and the "Rise and Fall,"* 79 B.U. L. REV. 263, 266 (1999).

tracting parties.[145] In the context of subscriptions where consumers have paid for months or years worth of services or discounts that they have never used, the most reasonable interpretation seems to be that the consumer has forgotten about the agreement, never intended to sign up in the first place, or has failed to cancel due to consumer inertia.[146] In addition, customers reasonably expect that they will not have to pay hundreds or thousands of dollars for nothing. Thus, public policy suggests that the law should be able to interfere in instances of subscriptions involving services and discounts that a customer does not use.

B. How Should the Law Protect Consumers?

How should the law protect consumers against the dangers particular to subscriptions involving services and discounts? Ideally, a solution would be a new law or regulation focused on these specific dangers.[147] For example, the targeted negative option marketing provisions 1970s were largely successful because of their specificity.[148] With regard to subscriptions involving services or discounts, the specific danger involved is that a consumer might forget about or never have intended to enter into a negative option agreement, that the seller might then take gross advantage of this due to the negative option structure, and that the consumer will consequently wind up paying for un-accessed services and discounts.[149] Thus, a targeted law should protect customers from being charged large amounts of money for services and discounts that they never use, and should prevent the exploitation of consumer inertia in these cases.

This Note argues that, under particular circumstances, subscriptions involving services and discounts should not be allowed to continue in perpetuity after a consumer initially enters the agreement. Prolonged disuse suggests that a subscription has become predatory—that the consumer no longer derives a benefit from the agreement and that the seller

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145 *See id.* For example, courts have often held provisions of insurance contracts unenforceable where they contravene policyholder expectations. *See, e.g.*, DiOrio v. New Jersey Mfrs. Co., 398 A. 2d 1274, 1280–81 (N.J. 1985).

146 This assumption is reasonable given the realities of consumer behavior. *See* FED. TRADE COMM'N, *supra* note 18, at 7; Marzilli Ericson, *supra* note 135, at 43; BABIN, *supra* note 109, at 317.

147 The Telemarketing Sales rule and § 8403 already address many of the general dangers common to all negative option agreements. *See* 16 C.F.R. § 310; 15 U.S.C. § 8403. Thus, a targeted solution is preferable.

148 *See* Lamont, *supra* note 57, at 1322 (describing the consensus that the problems associated with pre-notification negative option plans and unsolicited merchandise had been solved).

149 *See* Harris, *supra* note 25 ("Negative option marketers count on the fact that most people forget the whole thing and don't notice charges to their credit card or bank account for months.").

is taking advantage of consumer inertia. Therefore, after a period of disuse, such an agreement should no longer enjoy the benefit of the negative option structure. Ideally, this approach would provide for a triggered "opt in" feature whereby, following a period of one year, a seller must notify the customer that his or her subscription has not been used for one year and will be terminated unless the customer affirmatively opts back into the agreement in some manner. Such a feature would still allow the customer to opt into the agreement if he or she is planning to use the given services or discounts in the future or if he or she deems it to be beneficial. Thus, this type of provision would preserve the benefits of the negative option structure at a minimal cost in cases of legitimate, beneficial, and efficient agreements—as opposed to wasteful or predatory negative option agreements.

This solution both serves public policy and addresses several of the concerns inherent in subscriptions offering goods or services. A triggered opt-in feature would help restore bargaining power to the customer by putting sellers in the position of having to make a new offer. Because they have to make such offers in order to maintain a customer's business, sellers would be re-incentivized to develop quality products and services. Additionally, a triggered opt-in feature would reduce the exploitation of consumer inertia. The negative option agreement will be brought a customer's attention once again, and the customer will have had the benefit of a full year to either utilize the offered services or discounts, or to realize that he or she does not want these services or discounts. In either event, we no longer have the "click-happy" customer that spontaneously entered into a negative option agreement out of a desire for instant gratification.

To illustrate, suppose that Jane Consumer is a customer of JustFab.com. She has purchased a pair of shoes and has agreed to the terms of the sale. Under these terms, JustFab.com enrolls her as a member at a cost of forty dollars per month. For this amount, she can log in and use her accumulated subscription fees to buy discounted shoes. However, she never does. One year passes by, and she has paid 480 dollars for the "potential" to buy shoes from JustFab.com at a discount. At this point, JustFab.com must send Jane notice that her subscription will be terminated at the end of the month unless she opts back in. For example, JustFab.com might notify Jane of her subscription's pending termination via email, and include a link that she can click to "opt in" and reactivate her subscription. If Jane opts in, the subscription continues as it has before. If the agreement is beneficial to Jane and she does wish to opt in, the benefits of the negative option structure are preserved at a minimal cost: clicking a link. If Jane does not opt in, JustFab.com must terminate the agreement. Jane would have lost the money that she paid for the year of membership that she did not use. The only other cost is the termination of JustFab.com's income from an agreement that the consumer no longer wanted or used. Ultimately, this should encourage JustFab.com to stop relying on consumer inertia and start marketing goods or services that actually make a consumer want to continue to "opt in."

CONCLUSION

Negative option schemes are increasingly common in today's subscription economy. Such agreements have the potential to provide numerous benefits to customers and companies alike. However, many commentators have noted the dangers associated with negative option plans. The structure of negative option plans gives sellers increased control over charging consumer accounts, thus heightening the temptation for companies to engage in deceptive and fraudulent practices. Fortunately, current laws have worked to prevent the most heinous of these practices by requiring adequate disclosure of the material terms of negative option transactions and by requiring that sellers provide easy cancellation procedures. However, what makes negative option agreements unique is that a subtler, less brazenly fraudulent harm still lurks. This harm lies in the fact that the negative option structure encourages companies to exploit consumer inertia. Through such exploitation, consumers may end up paying for goods, services, or discounts that they do not want.

This harm is especially potent in negative option agreements in the form of subscriptions involving services and discounts. Consumers are more likely to be unaware of these agreements, largely because consumers only receive a tangible benefit when they themselves initiate access to services or discounts. In addition, consumers may end up paying for services and discounts that they never choose to access. This Note concludes that these dangers would be mitigated by legislation requiring consumers to affirmatively decide to continue agreements following a period of disuse. After such a period, the seller should provide notice to the buyer that a subscription will be terminated unless the buyer opts back in to the agreement. In targeting only subscriptions involving services or discounts, and only those agreements in which a consumer has not affirmatively sought the use of these services or discounts for a period of time, this solution singles out the agreements most likely to be inefficient and abusive. Thus, this solution preserves the benefits of negative option agreements while still protecting consumers and the integrity of the marketplace.