

ADVERTISING, MARKETING & PROMOTIONS

>>ALERT

SUBSCRIPTION-BASED MARKETERS SHOULD PREPARE FOR NY'S NEW AUTOMATIC RENEWAL LAW

As more and more marketers take to the Internet to provide goods and services in this post-pandemic era, subscription-based offerings are on the rise.

With the click of a mouse, consumers can get everything from vitamins, to wine, to work out gear on an auto-recurring basis. However, marketers who make subscription-based offers need to be aware of the myriad of laws governing such offers both at the federal and state level, including New York's Automatic Renewal Law (ARL), which goes into effect on **February 9, 2021**.

THE CURRENT LANDSCAPE

At the federal level, negative option/automatic renewal offers (i.e., offers where a consumer's lack of action to stop or cancel is deemed consent) have increasingly become the focus of the FTC's attention. In recent years, the FTC has brought actions against marketers who engage in unlawful automatic renewal practices to entice and retain consumers through subscription based contracts, relying on various laws, rules and regulations including the [Restore Online Shoppers' Confidence Act](#) (ROSCA), the FTC's current [Negative Option Rule](#), and the Telemarketing Sales Rule (TSR).

At the state level, a similar focus has been made to address deceptive negative option practices. A number

THE BOTTOM LINE

- >> The New York Automatic Renewal Law (ARL) has arrived, and it covers B2C subscription contracts.
- >> Marketers offering New York consumers goods or services on a subscription or automatic renewal basis should review their negative option/auto-renewal program practices to ensure compliance with the new law.

of states, including California, have enacted their own automatic renewal laws (ARLs) to crack down on this important consumer issue. Marketers must be particularly careful in complying with these laws, as state ARLs have increasingly become the basis of consumer class action lawsuits, especially in states like California where the state has seen an uptick in consumer class actions based on ARL violations.

NEW YORK'S NEW ARL

Up until now in New York, negative option/auto-renewal contracts have been governed by Section 5-903 of New York's General Obligation's Law, the scope of which is limited to vendor servicing contracts for the repair of real or personal property. Signed by Governor Cuomo, Senate

Bill 1475 amends New York's General Business Law, and introduces an additional consumer protection law that more broadly covers business to consumer (B2C) automatically renewing subscription programs, like subscription boxes, or automatically renewing online services contracts.

The key requirements under the new law are very similar to California's ARL and include the following:

- >> **Clear and Conspicuous Terms.** Offer terms must be presented to consumers in a clear and conspicuous manner, in close proximity to where a consumer's consent is being requested.
- >> **Disclosures.** Offer terms must clearly disclose material terms such as the continuing nature of the agreement, details around

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the charges to be made to the consumer's card or other payment method, and the marketer's cancellation policy.

- >> **Affirmative Consent.** No charges may be made to the consumer without the consumer's prior affirmative consent to offer terms. In the event a marketer sends any goods or performs any services without first obtaining the affirmative consent of the consumer, such goods and/or services will be deemed to be an "unconditional gift" to the consumer, for which the consumer shall bear no cost or expense.

>> **Retainable Acknowledgement with Cancellation Policy.**

Marketers must provide consumers, "in a manner that is capable of being retained by the consumer":

- 1) An acknowledgement that includes the offer terms, cancellation policy, and information on how the consumer may cancel the agreement; and
- 2) To the extent applicable, notice of any material changes to the terms and conditions originally agreed to by the consumer, as well as information on how to cancel such amended terms.

ENFORCEMENT

Under New York's new ARL, the New York Attorney General is empowered to seek an injunction against any marketer in violation:

- >> Non-compliant marketers can face civil penalties up to \$100 for a single violation, and up to \$500 for multiple violations arising from a single act or incident.
- >> For "knowing violations" the maximum penalty for a single violation increases to up to \$500 for a single violation, and up to \$1,000 for multiple violations arising from a single act or incident.

However, if a marketer can prove that its violation of the law was unintentional, and was the result of a "bona fide error" that occurred, despite its adoption and implementation of practices and procedures to ensure compliance with the law, then such violation will not be deemed a violation of the law.

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