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Not Strict Enough: California Proposes Further Amendments to Automatic Renewal Law

The Bottom Line

- California's proposed amendment includes further and more specific requirements for obtaining consumers' consent, sending consumers reminders and establishing cancellation mechanisms.
- The proposed changes align with the FTC's proposed updates to the Negative Option Rule, suggesting the proposed Rule should be the gold standard for compliance efforts.
- Subscription-based companies should take the time now to audit their sign-up flows and operational practices and be prepared for an upswing in regulatory scrutiny and consumer claims.

Operating a subscription-based company in 2024 continues to be a constantly moving target of compliance. California, which already had one of the country's strictest automatic renewal laws, recently saw its Legislature propose amendments that closely track the FTC's proposed updated Negative Option Rule. If the amendment in its current form is signed into law, it would impose further compliance obligations for companies that offer auto-renewals, negative options and continuous service offers.

California Assembly Bill 2863's proposed amendments would only apply to contracts "entered into, amended, or extended" on or after January 1, 2025, although state regulators and class action plaintiffs' attorneys could test the law's limits to include customers who enrolled in an auto-renewal program prior to January 2025. Companies offering subscriptions that automatically renew should therefore prioritize implementing a compliance program (or reviewing their current program).

Obtaining Affirmative Consent

Sellers will need to obtain consumers' affirmative consent to the automatic renewal or continuous service in a manner that is separate from any other part of a transaction. This requirement follows the FTC's interpretation of the Restore Online Shopper's Confidence Act (ROSCA) and its proposed updates to its Negative Option Rule providing that an unchecked checkbox or similar mechanism would "likely satisfy" the affirmative consent requirement. Sellers would be required to keep a record of such consent for three years or one year after the contract is terminated, whichever is longer.

The proposed amendment would also prohibit sellers from including any information in the contract that interferes with, detracts from, contradicts or otherwise undermines consumers' ability to provide affirmative consent to the automatic renewal or continuous service. It would also forbid misrepresenting, expressly or by implication, any material fact related to the transaction including, but not limited to, the inclusion of an automatic renewal or continuous service, or any material fact related to the underlying good or service.

Sellers should be aware of these additional requirements, as they expand the universe of potential violations under California's law and empower regulators and class action plaintiffs to target companies for statements or misrepresentations of their policies that are unrelated to the autorenewal program. These can include, for example, allegations that the seller failed to substantiate claims about the underlying product or to disclose material connections with endorsers and influencers for a subscription-based product.

Consumer Reminders

If a seller increases the price of an existing annual autorenewal offer, it would be required to notify the consumer of the price increase at least 45 days in advance of it taking effect and inform them how to cancel the contract.

Sellers would also be required to send consumers an annual reminder that discloses the automatically renewing product or service, the frequency and amount of autorenewal charges, and how to cancel. The annual reminder would need to be provided regardless of the length of the autorenewal term (e.g. a month-to-month program that continues past 12 months).

Cancellation

Sellers would be required to permit consumers to cancel their subscriptions "in the same medium" that the consumer used to enter the autorenewal. This would effectively prohibit allowing email to be a legally compliant mechanism to cancel web- or app-based transactions, and codify the position taken by the FTC and the California Automatic Renewal Taskforce (CART).

If the consumer enrolled over the phone, the seller would need to permit the consumer to call the same telephone number to cancel their autorenewal. Sellers would need to make the phone number available during "normal business hours," which the amendment defines as no fewer than 12 hours between 6 a.m. and 10 p.m., Pacific Time, Monday through Friday, other than state holidays. The seller also may not obstruct or delay the consumer's ability to cancel or require the consumer to engage in additional steps to immediately cancel.

For More Information

Please contact the attorney listed below or the Davis+Gilbert attorney with whom you have regular contact.

Paavana Kumar

Partner
212 468 4988
pkumar@dglaw.com

Jeremy Merkel

Associate
212 468 4976
jmerkel@dglaw.com