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New York's Broad Automatic Renewal Law (and the Accompanying Compliance Issues) Coming in February 2021

December 4, 2020

New York has enacted a new law, effective February 9, 2021, regulating automatic renewal and some "free trial" type agreements. While some organizations may have already taken steps to be in compliance with industry requirements, certain provisions of the federal Restore Online Shoppers' Confidence Act (ROSCA), 15 U.S.C. §§ 8401-8402, and similar auto-renewal laws in place in California and other states, all businesses should review their practices to ensure compliance with this new law.

The New York law is, in many ways, modelled after California's comprehensive auto-renewal law. (See Cal. Bus. & Prof. Code § 17600 et seq.). The California law requires, among other things, that companies present "automatic renewal offer terms" in a "clear and conspicuous manner before the subscription or purchasing agreement is fulfilled" and that no consumers' credit card be changed for renewal without "affirmative consent." Despite the existence of regulation in this area, the issue is apparently still one of concern, as the law was enacted to address what New York legislators contended is "an increasing number of consumers…struggling with misleading offers known as automatic renewals of merchandise and services."

With the California legislative template in mind, on November 11, 2020, New York's Governor Cuomo signed into law S1475, which amends the General Business Law to enact New York's own strict auto-renewal law. S1475 includes broad consumer protection requirements and imposes notice and transparency requirements regarding offer terms and cancellation options for automatic renewal plans and arrangements. Businesses that promote "free" trials of products or services distributed as part of an automatic renewal agreement will have to give notice about any future recurring charges after the trial period and a post-sale acknowledgement about how to cancel before expiration of the trial period. While many of the provisions are similar to those in California's auto-renewal law, there are some differences with regard to exceptions, enforcement, and the safe harbor for good faith compliance, among other things.

It should be noted that New York already had a narrow auto-renewal statute (N.Y. Gen. Oblig. Law § 5-903) that is limited to contracts "for service, maintenance or repair to or for any real or personal property." However, S1475 does not repeal this existing statute. Thus, entities that fall within the scope of the existing law should review their practices as they may now have to comply with a second auto-renewal law starting in February of next year.

What contracts are covered?

Some states' auto-renewal laws are limited to certain types of contracts, such as gym/health clubs, leases for personal property or specific types of service contracts. However, S1475 covers any "automatic renewal" or "continuous service" contracts with consumers (with some limited exceptions, such as for security system alarm operators, service contract sellers, banks and financial institutions and for businesses regulated by the NYDFS, and entities doing business pursuant to a franchise issued by a governmental agency).

Under the statute, "automatic renewal" means "a plan or arrangement in which a paid subscription or purchasing agreement is automatically renewed at the end of a definite term for a subsequent term." Similarly, the term "continuous service" means "a plan or arrangement in which a subscription or purchasing agreement continues until the consumer cancels the service."

What are the new requirements?

Under the statute, any business making an automatic renewal or continuous service offer to a consumer in New York must:

- Present the automatic renewal offer terms or continuous service offer terms in a "clear and conspicuous manner" (including an explanation of charges that would incurred after any free trial period ends) before the subscription or purchasing agreement is fulfilled and in "visual proximity" to the request for consent to the offer;
- Avoid charging the consumer for an automatic renewal or continuous service without first obtaining the consumer's affirmative consent to the automatic renewal offer terms; and
- Provide an "acknowledgment" that includes "the automatic renewal or continuous service offer terms, cancellation policy and information regarding how to cancel." If the offer includes a free trial, the business shall also disclose in the acknowledgment how to allow the consumer to cancel before the consumer pays for the goods or services. The acknowledgement must be sent in "a manner that is capable of being retained by the consumer."

S1475 defines "clear and conspicuous" to mean "in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks, in a manner that clearly calls attention to the language." (*Note*: For additional guidance, the FTC has previously proffered its own thoughts about when a disclosure is "clear and conspicuous").

Under S1475, the first of the two requirements listed above apply prior to the completion of the initial order for the automatic renewal arrangement; the third requirement is to be fulfilled after completion of the initial order.

In addition, as a practical incentive to obtain adequate consent, S1475 states that if a business sends any goods to a consumer under a continuous service agreement or automatic renewal of a purchase without first obtaining the consumer's affirmative consent, such goods will be deemed "an unconditional gift to the consumer," who may use or dispose the goods without any further obligation or payment (including shipping). *Note*: One issue that has arisen in litigation under California's auto-renewal law is whether the unconditional gift provision applies only to tangible goods or would also apply to digital products or services. The text of the New York does not expressly cover this distinction.

What must be included in the automatic renewal terms?

S1475 lists a number of "clear and conspicuous" disclosures that must be included in the automatic renewal offer terms, including: (1) that the subscription will continue until the consumer cancels; (2) the details of the cancellation policy; (3) the recurring charges (and if and how much the amount of the charges may change, if known); (4) the length of the automatic renewal term or notice that the service is continuous (unless the length of the term is chosen by the consumer); and (5) any minimum purchase obligation.

Regarding cancellation, the statute contemplates a number of "cost-effective, timely and easy-to-use mechanisms." Notably for e-commerce businesses, S1475 requires that a consumer who accepts an automatic renewal or continuous service offer online "shall be allowed to terminate the automatic renewal or continuous service exclusively online" (e.g., a pre-formatted online termination form).

In the event of "material changes" to the terms already accepted by a consumer, the law requires the business provide a "clear and conspicuous" notice of the change and provide information about how a consumer may cancel.

How will the statute be enforced?

New York's new auto-renewal law authorizes enforcement by the state attorney general, allowing for injunctive relief and civil penalties for knowing violations of up to $500 for a single violation and up to $1,000 for multiple violations from a single act or incident.

As with the California law, there is no express private right of action. However, California's law states that "a violation of this law shall not be a crime. However, all available civil remedies that apply to a violation of this article may be employed." Armed with this language, private litigants have asserted claims under state consumer protection statutes with the predicate deceptive practice and economic harm stemming from violations of the California's state's auto-renewal law. For example, this past summer, the online dating service Bumble reached a $22.5 million settlement over class claims that it failed to, among other things, disclose the automatic renewal terms of the weekly recurring Bumble Boost subscription or gain the plaintiff's affirmative consent to the automatic renewal of the premium service in violation of California and New York consumer protection laws. (*King v. Bumble Trading, Inc.*, No. 18-06868 (N.D. Cal. July 15, 2020) (preliminary $22.5M settlement approval)).

Unlike California's law, the enforcement provision in New York's automatic renewal law states in detail how the state attorney general may bring proceedings under the law, but does not contain a catchall or other language reserving civil remedies. Still, even without express language in the statute, once the New York law becomes effective, entities entering into automatic renewal plans with consumers should expect litigants to attempt a similar strategy of bootstrapping automatic renewal violations under state consumer protection law claims in New York courts.

Importantly, while broad in nature, S1475 is not limitless in scope. The statute only covers automatic renewal or continuous service contracts with consumers for "goods, services, money, or credit for personal, family, or household purposes," and thus does not appear to cover business-to-business arrangements. Also, notably New York's new auto-renewal statute contains a safe harbor from liability if the business can show that a violation was "not intentional" and "resulted from a bona fide error" that occurred despite having "reasonably adopted" procedures in place to avoid such errors. While this safe harbor may not protect a business from the costs of defending a "gotcha" lawsuit over minor procedural violations of the automatic renewal law (even if the business ultimately prevails), it is a carrot meant to encourage the development of procedures to ensure compliance with the relevant notice and consent requirements in the statute.

Final Thoughts and Compliance Recommendations

Overall, given that the New York statute contains similar provisions to the California law, and based on the experience in California, an uptick in litigation testing the bounds of New York's new automatic renewal law is to be expected once it becomes effective in February 2021. While organizations with national scope have likely instituted compliance procedures following passage of the California law in 2018 (and perhaps certain other procedures when the payment cards updated their own requirements on merchants regarding consumer certain recurring subscriptions (e.g., Visa's April 2020 "Trial Subscription Updates"), litigation testing those practices against the New York standard is all but certain.

In general, organizations that may fall within the scope of the new law (including those already subject to New York's existing automatic renewal law) should review their automatic renewal offer terms, as well as the language of the "acknowledgement" sent to consumers following registration and notices concerning materials changes to relevant terms.

Mobile app operators should evaluate notice and consent requirements under the new law given the small screen size displaying the relevant notices and terms and the statutory requirements that offer terms be presented in "visual proximity" of the consent mechanism (e.g., "I Agree" or "Pay Now" button). The statute requires automatic renewal offer terms be presented in a "clear and conspicuous" manner, but query whether a conspicuous hyperlink (presented in a larger, stand-out font) leading to a page with the automatic renewal offer terms would satisfy the statute, or would the required notices literally have to be presented in full to the user in proximity of the "I Agree" button. Similar issues with respect to notice and conspicuousness have arisen (and continue to arise) with respect to the enforceability of clickwrap agreements and similar online agreements in e-commerce over whether the user was given reasonable notice of the existence of binding terms.

Organizations should carefully document their efforts to comply with the New York statute so that they can make a showing of bona fide efforts to be compliant and take advantage of the safe harbor if necessary.

With February 2021 fast approaching, now is the time for businesses with New York consumers or online users to reexamine practices surrounding automatic renewal and continuous service contracts to avoid the eye of the attorney general or class action litigants.

Special thanks to Jonathan Mollod for his assistance on drafting this alert.

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