Date of Hearing: April 30, 2024

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION
Rebecca Bauer-Kahan, Chair
AB 2863 (Schiavo) – As Amended March 21, 2024

SUBJECT: Automatic renewal and continuous service offers

SYNOPSIS

Businesses offering goods and services through automatic renewal agreements have increasingly pervaded most aspects of daily life. Many mobile applications are subscription-based, ranging from health and fitness apps to geographic information systems apps. Put simply, Californians have come to rely on subscription services for a plethora of good and services, including meal/ingredient delivery, entertainment, clothing selection and procurement, and even the regular replenishment of household goods, and a significant portion of these subscription services employ an auto-renewal model.

Automatic renewal is a valuable tool for businesses, creating a consistent and predictable revenue stream that they otherwise would not have if they needed to reach out to consumers to renew their subscriptions or to seek authorization to charge their credit or debit cards. One of the earliest businesses to adopt this type of model are health clubs and gyms. Consumers hoping to develop a regular fitness routine join local gyms. However, over time they often attend less frequently, until they stop all together. With gym members being automatically charged in perpetuity, the business may obtain months or even years of passive income, while not needing to provide a service to members who no longer attend. Automatic renewal also can provide benefits to consumers by allowing them to maintain uninterrupted, and often highly convenient, access to a good or service that they want or need, without the hassle of repeatedly submitting payment information.

However, as these automatically renewed subscriptions and services become more ubiquitous, the sheer volume of monthly and annual payments can cause customers to easily lose track of all of the things they are paying for – various video and music streaming services, smartphone apps, online games, food delivery memberships, magazine and newspaper subscriptions, to name a few. The practice has become so widespread that it has spawned a new industry: companies that, for a portion of the savings, will compile all of a consumer's subscriptions and cancel those that the consumer no longer uses.

Over the last 15 years, the Legislature has taken significant steps to protect consumers when it comes to automatic renewal agreements by providing broad consumer protections pertaining to auto-renewal agreements. Legislation by Senator Hertzberg in 2017 increased the existing protections by providing that if an automatic renewal offer or continuous service offer includes a free gift or trial, the offer must include a clear and conspicuous explanation of the price that will be charged after the trial ends or the manner in which the pricing of the agreement will change upon conclusion of the trial. The bill also required that a consumer who accepts an auto-renewal offer online must be permitted to terminate the service exclusively online.

Most recently, Assemblymember Berman, in 2021, carried legislation that, among other provisions, required that if a business makes an automatic renewal offer or continuous service offer it must provide the consumer with a renewal notice at least 15 days and not more than 45 *days before the subscription of service renews. It also required that businesses that offer a promotional or trial period for a subscription provide the consumer with a notice at least three days before and at most 21 days before the expiration of the predetermined period of time for which the free gift or trial, or promotional or discounted price, applies.*

The current bill continues efforts to protect consumers who find themselves with automatically renewing subscriptions and services by doing the following:

- ***Creating a "click to quit" requirement.** Essentially, businesses will be required to make it just as easy for a consumer to unsubscribe as it was to subscribe in the first place. Consumers would no longer have to follow multiple links or take extra steps to cancel an automatic renewal.*

- ***Requiring clearer consent practices.** A business that seeks to have a consumer enter into an automatic renewal agreement will be required to obtain affirmative consent for that automatic renewal separately from any other part of the contract.*

- ***Requiring notifications related to the amount and range of costs the consumer may be charged.** Specifically, the business will need to provide a notice that includes the amount or range of costs the consumer will be charged. In addition they need to include the frequency of those charges unless the consumer cancels the automatic renewal.*

- ***Limiting tactics businesses can use to retain customers if cancellation is handled over the telephone.** In the event a business provides a toll-free number for cancellations, that business is required to answer calls promptly during normal business hours. In addition, the business is prohibited from obstructing or delaying the consumer's request to cancel. Finally, the cancellation must take effect immediately.*

This bill is sponsored by the Consumer Federation of California and is opposed by a number of business organizations, including the California Chamber of Commerce and the Newspaper Publishers Association.

SUMMARY: Requires that a consumer be able to cancel an automatically renewed subscription in the same manner that the consumer used to subscribe to the continuous service in the first place. Specifically, **this bill**:

1) Expands the current definition of "automatic renewal" to include the provision of a contract and free subscriptions.

2) Makes it unlawful for a business that makes an automatic renewal offer or continuous service offer to do any of the following:

   a) Fail to obtain the consumer's affirmative consent to the automatic or continual renewal separate from any other portion of the contract.

   b) Include information in the contract that interferes with, detracts from, contradicts, or otherwise undermines the ability of consumers to provide their affirmative consent.

   c) Fail to maintain verification of the consumer's affirmative consent for at least three years, or one year after the contract is terminated, whichever period is longer.

3) Requires that the consumer notice be provided before obtaining the consumer's billing information and conspicuously state the amount or range of costs the consumer will be charged and the frequency of those charges.

4) Requires that if a business provides for cancellation by a toll free number, the business must:

   a) Answer the calls promptly during normal business hours.

   b) Not obstruct or delay the consumer's ability to cancel.

   c) Not require the consumer to engage in additional steps to cancel immediately.

5) Requires that the ability to cancel or terminate the renewal or continuous service be available to the consumer in the same medium that the consumer used in the transaction that resulted in the activation of the automatic renewal or continuous service in the first place.

6) Requires, at least 45 days before any fee increase takes place, that a business provide the following:

   a) A clear and conspicuous notice of the fee increase.

   b) Information regarding how to cancel in a manner that is capable of being retained by the consumer.

7) Requires a business to send an annual reminder to a consumer under an automatic renewal agreement or continuous service agreement in the same medium the consumer used to activate the service. If the consumer signed up in-person, the business must send a reminder by telephone or an internet-based communication.

8) Requires that the annual reminder disclose the following:

   a) The product or service to which the automatic renewal applies.

   b) The frequency and amount of charges associated with the service.

   c) The means to cancel the service.

9) Applies to any contract entered into, amended, or extended on or after January 1, 2025.

EXISTING LAW:

1) Pursuant to the federal Restore Online Shoppers' Confidence Act, prohibits any person from charging or attempting to charge any consumer for any goods or services sold in a transaction effected on the internet through a negative option feature (i.e., opt-out), and requires that the person discloses the material terms of the transaction before obtaining a consumer's billing information, that the person obtains the consumer's express informed consent before charging the consumer's method of payment for products or services through that transaction, and that the person provides simple mechanisms for a consumer to stop recurring charges from being placed on their method of payment. (15 U.S.C. § 8403.)

2) Expresses the intent of the Legislature to end the practice of ongoing charging of consumer credit or debit cards or third party payment accounts without the consumers' explicit consent for ongoing shipments of a product or ongoing deliveries of service. (Bus. & Prof. Code § 17600.)

3) Prohibits a business making an automatic renewal offer or continuous service offer to a consumer from failing to present the offer terms in a clear and conspicuous manner before the subscription or purchasing agreement is fulfilled and in visual proximity, or in the case of an offer conveyed by voice, in temporal proximity, to the request for consent to the offer. (Bus. & Prof. Code § 17602(a)(1).)

4) Requires, if an offer includes a free gift or trial, that the offer include a clear and conspicuous explanation of the price that will be charged after the trial ends or the manner in which the subscription or purchasing agreement pricing will change upon the conclusion of the trial. (Bus. & Prof. Code § 17602(a)(1).)

5) Defines the following terms:

   a) "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.

   b) "Continuous service" means a plan or arrangement in which a subscription or purchasing agreement continues until the consumer cancels the service. (Bus. & Prof. Code § 17601.)

6) Prohibits a business from charging the consumer's credit or debit card, or the consumer's account with a third party, for an automatic renewal or continuous service without first obtaining the consumer's affirmative consent to the agreement containing the offer terms, including the terms of an offer that are made at a promotional or discounted price for a limited period of time. (Bus. & Prof. Code § 17602(a)(2).)

7) Provides that in any case in which a business sends any products to a consumer under a continuous service agreement or automatic renewal of a purchase without first obtaining the consumer's affirmative consent, the products shall be deemed an unconditional gift to the consumer without any obligation whatsoever on the consumer's part to the business. (Bus. & Prof. Code § 17603.)

8) Requires a business to provide an acknowledgement that includes the offer terms, cancellation policy, and information regarding how to cancel in a manner that is capable of being retained by the consumer. (Bus. & Prof. Code § 17602(a)(3).)

9) Requires, if the offer includes a free gift or trial, that the business also disclose in the acknowledgement how to cancel, and allow the consumer to cancel, the offer before the consumer pays for the goods or services. (Bus. & Prof. Code § 17602(a)(3).)

10) Requires a business that makes an offer to provide a toll-free telephone number, email address, or postal address if the seller directly bills the consumer, or another cost-effective, timely, and easy-to-use mechanism for cancellation that is described in the acknowledgement. (Bus. & Prof. Code § 17602(c).)

11) Requires that a consumer who accepts an offer online be allowed to terminate the service exclusively online. (Bus. & Prof. Code § 17602(d).)

12) Requires that, in the case of a material change in the terms of an automatic renewal or continuous service that has been accepted by a consumer, the business shall provide the consumer with a clear and conspicuous notice of the material change and provide information regarding how to cancel in a manner that is capable of being retained by the customer. (Bus. & Prof. Code § 17602(e).)

13) Exempts from the provisions described above certain services, including: any service provided pursuant to a franchise issued by a political subdivision, as specified; any service provided by a business or its affiliate where either is regulated by the California Public Utilities Commission, the Federal Communications Commission, or the Federal Energy Regulatory Commission; any entity regulated by the Department of Insurance; alarm company operators; financial institutions; and service contract sellers and administrators regulated by the Bureau of Electronic and Appliance Repair. (Bus. & Prof. Code § 17605.)

FISCAL EFFECT: As currently in print, this bill is keyed non-fiscal.

COMMENTS:

1) **Negative option marketing**. The Federal Trade Commission (FTC) describes negative option marketing as a provision of a contract under which the consumer's silence or failure to take affirmative action to reject a good or service or to cancel the agreement is interpreted as acceptance or continuing acceptance of the offer.[1] In other words, the subscription or contract is automatically renewed and the consumer is charged, absent an action taken by the consumer to cancel the service.

There are two general types of agreements that allow a business to continuously charge customers. In the case of automatic renewal agreements, the service is provided, and payments are automatically collected, for a definite term, but a new term begins automatically following the expiration of the term unless renewal is actively declined. Continuous service agreements lack a definite term, and instead continue indefinitely until a party affirmatively terminates the agreement. Businesses offering goods and services through automatic renewal agreements or continuous service agreements have increasingly pervaded most aspects of daily life. Many mobile applications are subscription-based, ranging from health and fitness apps to geographic information systems apps. Put simply, Californians have come to rely on subscription services for a plethora of good and services, including meal/ingredient delivery, entertainment, clothing selection and procurement, and even the regular replenishment of household goods, and a significant portion of these subscription services employ an auto-renewal model.

Automatic renewal is a valuable tool for businesses, creating a consistent and predictable revenue stream that they otherwise would not have if they needed to reach out to consumers to renew their subscriptions or to seek authorization to charge their credit or debit cards. One of the earliest businesses to adopt this type of model are health clubs and gyms. Consumers hoping to develop a regular fitness routine join local gyms. However, over time they often attend less frequently, until they stop all together. With gym members being automatically charged in

[1] https://www.federalregister.gov/documents/2023/04/24/2023-07035/negative-option-rule

perpetuity, the business may obtain months or even years of income, while not needing to provide a service to members who no longer attend. Auto-renewal also can provide benefits to consumers by allowing them to maintain uninterrupted, and often highly convenient, access to a good or service that they want or need, without the hassle of repeatedly submitting payment information.

However, as these auto-renewal subscriptions and services become more ubiquitous, the sheer volume of monthly and annual payments can cause customers to lose track of all of the things they are paying for – various video and music streaming services, smartphone apps, online games, food delivery memberships, magazine and newspaper subscriptions, to name a few. The practice has become so widespread that it has spawned a new industry: companies that for a portion of the savings, will compile all of a consumers subscriptions and cancel those that the consumer no longer uses.

2) **Legislative work in this area.** The Legislature has taken significant steps to protect consumers when it comes to automatic renewal agreements. In 2009, Governor Schwarzenegger signed into law SB 340 (Yee; Chap. 350, Stats. 2009), which established the intent of the Legislature to end the practice of ongoing charging of consumer credit and debit cards or third party payment accounts without the consumers' explicit consent for ongoing shipments of a product or ongoing deliveries of service.

Though SB 340 provided broad protections pertaining to auto-renewal agreements, some problematic practices, many of which are associated with free trials and promotional rates, were still identified in this space that were not regulated by its provisions. Businesses often provide free gifts, trials, promotions, or discounts in order to entice consumers to become fully paying customers, but many have apparently also exploited this practice to lull consumers into incidental charges as the trial transitions without notice into a paid subscription. SB 340 required that a business provide an acknowledgement to the consumer disclosing how to cancel the subscription with any free trial and required that the consumer have an opportunity to cancel before paying for the goods or services. However, SB 340 did not specify the nature of the cancellation process. Following the passage of SB 340, several California court cases highlighted abuse of this omission. In 2014, the Santa Cruz and Santa Clara Counties' District Attorneys' Offices reached a $1.8 million settlement with an online fashion retailer that imposed monthly fees on users of their website along with an extraordinarily difficult-to-use cancellation process, leading many to incur charges following free trial periods. In 2015, a $2.5 million settlement was reached against LifeLock for failing to provide proper acknowledgement of the terms of the trial and the cancellation process alongside the offer, and the same year, an $80 million class action against security software company McAfee contended that the company used auto-renewal to improperly increase subscription prices.

In response to these ongoing issues, in 2017, Senator Hertzberg introduced SB 313 (Chap. 356, Stats. 2017), which aimed to further protect consumers from harmful practices associated with auto-renewal. The bill provided that if an automatic renewal offer or continuous service offer includes a free gift or trial, the offer must include a clear and conspicuous explanation of either the price that will be charged after the trial ends or the manner in which the pricing of the agreement will change upon conclusion of the trial. The bill also required that a consumer who accepts an auto-renewal offer online must be permitted to terminate the service exclusively online.

Finally, Assemblymember Berman, in 2021, followed with AB 390 (Chap. 450, Stats 2021) further strengthened the consumer protections related to automatic renewals. The bill provided that if a business makes an automatic renewal offer or continuous service offer, they must provide the consumer with a renewal notice at least 15 days and not more than 45 days before the subscription of service renews. It also required that businesses that offer a promotional or trial period for a subscription provide the consumer with a notice at least three days before and at most 21 days before the expiration of the predetermined period of time for which the free gift or trial, or promotional or discounted price, applies. Finally, it required more streamlined cancellation procedures.

3) **Purpose of this bill.** As part of the FTC's ongoing review of its 1973 Negative Option Rule that it uses to combat unfair or deceptive practices related to subscriptions, memberships, and other recurring-payment programs, in March 2023, it proposed adding a "click to cancel" provision requiring sellers to make it as easy for consumers to cancel their enrollment as it was to sign up. According to the sponsors, Consumer Federation of California, this bill is modeled on several aspects of that rulemaking.

This bill seeks to strengthen the existing provisions by creating a "click to cancel" provision that requires sellers to make it as easy for consumers to cancel their enrollment as it was to sign up. In addition, it requires consumers' affirmative consent to be enrolled in subscription services, and mandates an annual reminder of the service.

4) **Author statement.** According to the author:

> The subscription economy is projected to become a $1.5 trillion market by 2025. However, this expansion has prompted businesses to intensely focus on enrollment and retention, leading to the creation of what is termed "manipulative subscription systems" or "dark patterns." These systems are designed to keep consumers locked into plans they may no longer need or want.
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> This trend has raised concerns, with instances of companies violating negative option terms and conditions drawing attention from the Federal Trade Commission (FTC). Since 2014, numerous actions against these practices including some led by the FTC. Despite legal actions, deceptive subscription practices persist. In 2023, for example, the FTC took action against Amazon, a major online retailer, for enrolling consumers in Amazon Prime without their consent and deliberately preventing them from canceling.
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> 2022 research found that, on average, 42% of consumers forgot they were still paying for a subscription they no longer used. In addition, the research demonstrated that consumers underestimated their monthly spending on subscriptions by $133.

5) **What this bill would do.** This bill makes several improvements to the consumer protections related to automatic renewals:

1. *Creates a "click to quit" requirement*. Essentially, businesses will be required to make it just as easy for a consumer to unsubscribe as it was to subscribe in the first place. Consumers would no longer have to follow multiple links or take extra steps to cancel an automatic renewal.

2. *Requires clearer consent practices.* A business that seeks to have a consumer enter into an automatic renewal agreement will be required to obtain affirmative consent for that automatic renewal separately from any other part of the contract.

3. *Requires notifications related to the amount and range of costs the consumer may be charged.* Specifically, the business will need to provide a notice that includes the amount or range of costs the consumer will be charged. In addition they need to include the frequency of those charges unless the consumer cancels the automatic renewal.

4. *Limits tactics businesses can use if cancellation is handled over the telephone.* In the event a business provides a toll-free number for cancellations, that business is required to answer calls promptly during normal business hours. In addition, the business is prohibited from obstructing or delaying the consumer's request to cancel. Finally, the cancellation must take effect immediately.

6) **Analysis.** At times it seems that virtually everyone has a story about either accidentally or intentionally subscribing to a service that includes auto renewal, whether it is thinking that they are subscribing to a magazine for one year at a promotional price and being surprised when it automatically renews a year later at five times that original price or subscribing to a streaming channel and realizing after a number of months that it is not something that is being used. Whatever the situation, many people have run into challenges associated with cancelling that service. Perhaps there is no phone number printed in the magazine to call or there is no way to cancel from the smart phone app. Whatever the challenge is, businesses do not have a vested interest in making it easy to cancel.

Given the continuing struggles people are having despite long existing federal regulations that were first adopted in the 1970s and California's on-going efforts to pass consumer-protective legislation, it appears reasonable to continue adopting policies, like those included in this legislation, that are designed to adequately inform consumers when they are entering into an automatic renewal agreement and that require businesses to make it as easy as possible for people to cancel those subscriptions when they no longer want them.

A coalition opposing the bill that includes the Association of National Advertisers, American Association of Advertising Agencies, California News Publishers Association, News Media Alliance, and TechNet raise a series of concerns, including:

- The bill requires a business to obtain a consumer's affirmative consent to the automatic renewal or continuous service "separately from any other portion of the contract." This term is unclear, as it does not specify what constitutes another "portion" of the contract. Additionally, requiring consent for a automatic renewal feature to be "separate" from consent regarding other portions would add yet another required obligation for consumers to indicate consent. This would make it more cumbersome for consumers to seamlessly agree to such an offer.

- [T]he bill would require the ability to cancel or terminate to be available in the same medium that the consumer used in the transaction that resulted in the activation of the automatic renewal or continuous service. It is not clear what is the "same medium." This proposal is both overly prescriptive and vague. It is overly prescriptive because it forces sellers to interact with consumers through a certain channel, even if the context of the consumer's relationship with the seller suggests the consumer would prefer another channel.

- [T]he bill requires businesses to maintain evidence of consumer consent for at least 3 years, or one year after a contract is terminated, whichever is later. This is unduly burdensome; for example, it appears to apply even in cases where a consumer signs up for a free trial and cancels it before the consumer is even charged. Instead of requiring businesses to maintain records that become irrelevant and unnecessary for retention, the bill should clarify that consent records do not need to be maintained if the business can show that customers have signed up for an offer only after providing their affirmative consent.

The first argument noted above expresses concern that requiring a separate affirmative consent to an automatic renewal service would make it "more cumbersome for consumers to seamlessly agree." Arguably, this is the primary point of the bill – to make it more difficult for businesses to get their customers to opt-in to an automatic renewal agreement without clearly understanding that they are doing so.

As to the opposition's second concern related to the "click to cancel" requirement in the bill, the language in the bill does not require that businesses *only* allow customers to cancel through the original medium. The business would be welcome to offer multiple cancelation methods, including one the "consumer's relationship with the seller suggests that the consumer would prefer. . . ."

The third argument made by the opposition may have some merit, though not for the reasons they articulate. Businesses often amass mountains of data on their customers, either to sell to other vendors or to better target their marketing, including retaining information on customers who cancel their automatic renewals. If they did not keep that information, former customers would not be inundated with pleas asking them to return and offering them special promotional rates to do so. So, while it is clearly not burdensome for businesses, it is probably unnecessary to require that they retain information that they are already retaining. Going forward, the author may wish to consider whether or not they would like to eliminate this provision. However, given current business practices, it likely does no harm to retain the requirement.

ARGUMENTS IN SUPPORT

The Consumer Federation of California, sponsors of the bill, argue:

> While automatic subscription renewals can offer some convenience, they far too often harm consumers and businesses. Consumers want and deserve transparent and understandable authorizations of consent, clear and understandable disclosure statements, and an easy way to cancel a subscription. As it stands currently, many subscriptions are almost impossible to cancel without undertaking a Kafkaesque process that frustrates consumers to no end, and does so to the direct financial benefit of corporations.
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> Since 2014, numerous enforcement actions against companies misleading consumers in this space have been undertaken by entities such as the Federal Trade Commission (FTC), with a particular focus on so-called negative option terms. In 2023, for example, the FTC took action against Amazon for enrolling consumers in Amazon Prime without their consent and then deliberately preventing them from canceling. The trend in this area is decidedly anti-

consumer. Simply put, consumers should be allowed to cancel a subscription using a simple process.

REGISTERED SUPPORT / OPPOSITION:

Support

Consumer Federation of California (sponsor)
Housing and Economic Rights Advocates (HERA)

Oppose

American Association of Advertising Agencies (4A's)
Association of National Advertisers
California Chamber of Commerce
California News Publishers Association
News Media Alliance
Technet

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