

Let 'Em Out! ROSCA and Changes to California's Auto-Renewal Law

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What's this about? Auto-renewing arrangements are ubiquitous, from TV channel subscriptions to meal-kit delivery plans - and the regulators are interested. Late last year, the FTC and California took actions with respect to auto-renewing subscriptions. The FTC issued a policy statement in October 2021 and California's governor signed into law amendments to the state's Automatic Renewal Law (ARL) that same month. California's ARL amendments take effect in July 2022, so now's a good time to survey where things stand and what's to come for businesses offering auto-renewing products or services to California consumers.

What are auto-renewing products or services? Sometimes called "negative options," auto-renewing products and services refer broadly to a category of transactions in which sellers or providers interpret a consumer's failure to take an affirmative step to either reject or cancel an offer as assent to be charged for products or services.

What is required by law now? There are at least two federal statutes implicated by auto-renewing products and services. The first is the Unordered Merchandise Act (UMA), which provides that "the mailing of un-ordered merchandise ... constitutes an unfair method of competition and an unfair trade practice" violative of the FTC Act. Under the UMA, recipients of unordered merchandise may treat it as an unconditional gift and may use or dispose of it as they see fit. Recipients also may simply refuse delivery. Because the UMA applies only to mailed "merchandise," courts have interpreted its coverage to reach "goods, wares," or "any tangible item held out for sale," but not "intangible" items such as memberships or subscriptions.

The second federal statute is the Restore Online Shoppers Confidence Act (ROSCA), which applies to "negative option" transactions, defined as "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." Under ROSCA, if a business charges or attempts to charge any consumer for goods or services online through a negative option, it must: (1) clearly and conspicuously disclose the material terms of the transaction before obtaining billing information; (2) obtain the consumer's express informed consent before charging the consumer; and (3) provide "simple mechanisms" for a consumer to stop recurring charges.

Although different from ROSCA, California's ARL imposes similarly rigorous information, notice and consent requirements on businesses that make auto renewal or continuous service offers to California consumers. If a business is using an auto renewal or continuous service plan in which the consumer must cancel to stop automatic charges, the business must: (1) present the offer terms in a "clear and conspicuous" manner; (2) obtain consumer's affirmative consent before charging his or her credit card; and (3) provide an acknowledgment including auto-renewal offer terms, cancellation policy, and details on how to cancel, including a toll-free phone number, an email or postal address, or other "easy-to-use" means for cancellation. Additionally, the ARL requires that if a material change in auto-renewal terms occurs, the business must "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 consumer."

Like the federal UMA, California's ARL provides that if a business sends merchandise or products to a consumer under an automatic renewal of a purchase or continuous service agreement without first obtaining the consumer's affirmative consent, the merchandise or products are deemed unconditional gifts to the consumer, and the business must bear their entire cost.

What changed? Last October 2021, the FTC issued an enforcement policy statement regarding "negative option marketing," and the California governor signed into law amendments to the state's ARL.

While the FTC's policy statement neither constitutes a new rule nor binds the agency or businesses, it does signal the FTC's intention to use its existing tools, including ROSCA and the Negative Option Rule (16 CFR Part 425), to ramp up enforcement efforts against companies using negative options to deceive consumers. The policy statement provides businesses guidance ? but mostly reminders ? about what is expected, including "clear and conspicuous" disclosure of offer terms; "express" and "informed" consumer consent, which the FTC says is not satisfied with a "pre-checked box"; and a simple and easy way to cancel negative option agreements. The policy statement itself does not use the term "dark patterns" - a fashionable term with a somewhat indefinite definition, which seems to generally cover user-interface designs or software that coax consumers to take some action they otherwise would not have - however, the Director of the FTC's Bureau of Consumer Protection specifically put on notice businesses that "deploy dark patterns and other dirty tricks" to "trap" consumers into subscription services.

Separately, California's governor signed into law Assembly Bill No. 390, which amended the state's existing ARL. Starting July 1, 2022, the amendments' effective date, businesses that enroll California consumers into auto-renewing or continuous service subscriptions must continue to comply with the current ARL requirements but also begin providing additional notices and new cancellation options to customers.

Specifically, the ARL amendments stipulate that when a business enrolls a customer in a subscription with a free trial or gift or an initial discount period that is longer than 31 days, the business must provide a written or electronic notice three to 21 days before the expiration of the applicable period. For subscriptions with an initial term of one year or longer, businesses will have to give written or electronic notice to California

consumers in a retainable form, 15 to 45 days before the renewal date. In both cases, the notice must provide in a clear and conspicuous manner: that the subscription term will automatically renew unless cancelled by the consumer; the length and any additional terms of the renewal period; one or more methods by which the consumer may cancel prior to renewal; and the business's contact information. If a business otherwise would be subject to both notification requirements because it offers a plan with a free trial period longer than 31 days and an initial term of one year or more, it must comply with only the latter notice requirement - delivering a reminder notice 15 to 45 days before the renewal date.

In addition, the ARL amendments provide for "immediate" cancellation online. Under the current ARL requirements, if a California consumer accepts an automatic renewal offer online, the business must allow the consumer to cancel the offer exclusively online. The amendments are more prescriptive with respect to online auto-renewals, requiring that the consumer not only be able to terminate the offer "exclusively online," but be able to do so "at will, and without engaging any further steps that obstruct or delay the consumer's ability to terminate the automatic renewal or continuous service immediately." The amendments further prescribe that the online termination method must be in the form of a "prominently located direct link or button" located within either a customer account or profile, or within either device or user settings, or an "immediately accessible termination email formatted and provided by the business that a consumer can send to the business without additional information."

So what now? Now is probably a good time for businesses offering auto-renewal services or subscriptions to re-evaluate their related policies and procedures to ensure that they comply with ROSCA, California's new ARL requirements, and other related state laws. And in light of the new ARL requirements, businesses might give special scrutiny to any multi-step consumer flows they require consumers to complete, such as customer satisfaction surveys, review retention offers, or take any other additional actions, before allowing them to cancel subscriptions or services. Neither Plaintiffs' bar nor regulators have been shy about enforcing the current ARL, which has been the source of numerous enforcement actions and multimillion-dollar settlements. No reason to think that will slow.

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