

## **Advisory** | Marketing, Advertising, Sweepstakes & Promotions Law



February 2023

### **Stricter Standards Emerging for Subscription-Style Services that Renew Automatically**

Subscription-style services that renew automatically from month to month (or year to year) are all the rage. Businesses love them because they can provide ongoing revenue streams. Consumers often like them for convenience. But regulators (and consumers who sometimes may become surprised when a “free” trial converts into an unexpected paid service or who encounter hurdles when trying to cancel a service) increasingly view them with suspicion.

For these reasons, the Federal Trade Commission (FTC) and many states have taken action to help implement the following types of consumer protections for auto-renewal programs: (a) clear disclosure of terms prior to enrollment; (b) affirmative and specific acceptance of the auto-renewal feature; (c) confirmation of terms immediately after enrollment; (d) notice prior to an annual renewal period, including clear disclosure of the cancellation method; and (e) availability of functioning cancellation methods that are convenient, fast, free, and at least as easy as any enrollment method(s).<sup>1</sup>

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<sup>1</sup> See, e.g., Cal. Bus. & Prof. Code § 17602; D.C. Code § 28A-203; N.Y. Gen. Bus. Law § 527-a; FTC, *Bringing Dark Patterns to Light*, pp. 11-15 (Sept. 2022).

One area receiving attention is the use of a separate checkbox (or other similar mechanism) for the consumer to accept auto-renewal terms apart from any other terms. A Vermont statute that took effect in 2019 provides: “[a] contract between a consumer and a seller or a lessor with an initial term of one year or longer that renews for a subsequent term that is longer than one month shall not renew automatically unless ... in addition to accepting the contract, the consumer takes an affirmative action to opt in to the automatic renewal provision.”<sup>2</sup> Additionally, the FTC has recommended separate acceptance in a policy statement,<sup>3</sup> and has imposed a specific requirement for separate acceptance in at least one recent enforcement action.<sup>4</sup>

Whether a totally separate checkbox (or similar mechanism) is strictly required in every case remains an open question – at least where: (1) the acceptance of the auto-renewal terms comes first and is extremely clear, (2) any additional terms (such as a privacy policy) are referenced via a simple link and don’t change the auto-renewal terms, and (3) any reference to acceptance of additional terms doesn’t blur or interfere with the consumer’s ability to clearly see and understand the auto-renewal terms being accepted.

Nevertheless, in light of the statutory and regulatory developments mentioned above – and possible further expansion of these trends – it is a recommended best practice to seek affirmative acceptance of auto-renewal terms ***apart from*** any other terms. Specifically, companies should consider the following principles when seeking consent from consumers for auto-renewal program terms:

- The auto-renewal terms should be clear and conspicuous at the time and place where the consumer enrolls.
- The consumer’s consent to the auto-renewal terms should be separate from any other terms or portion of the transaction.
- The mechanism used to seek consent (checkbox, signature, express consent button, etc.) must appear immediately adjacent to the auto-renewal terms.
- Do not use a pre-checked box for acceptance.
- Do not rely on terms in a linked set of general Terms of Service/Use to set forth the auto-renewal terms.

In addition to obtaining unambiguous, affirmative consent to clearly disclosed auto-renewal terms, companies should remember to follow the other requirements referenced above (often with differences in time periods and other details under individual state statutes) to do the following: (1) send any statutorily required post-enrollment confirmation email (with a reminder of the easy-to-use cancellation method(s)); (2) send any statutorily required annual auto-renewal reminder (again with a reminder of the easy-to-use cancellation method(s)); and (3) make sure the cancellation method is fast, convenient, free, not encumbered with efforts to persuade the consumer to re-enroll, and at least as easy to use as the available enrollment method(s).

Those seeking assistance with developing or reviewing the terms of their auto-renewal program should consult with experienced promotional law counsel.

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<sup>2</sup> 9 V.S.A. § 2454a(a)(2).

<sup>3</sup> FTC, *Enforcement Policy Statement Regarding Negative Option Marketing* (Nov. 4, 2021).

<sup>4</sup> *See, e.g., FTC v. Vonage Holdings Corp., et al.*, No. 3:22-cv-6435 (D.N.J. Nov. 3, 2022).

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