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New York's Enhanced Automatic Renewal Law Imposes Additional Disclosure Requirements on Business-to-Consumer Contracts

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On November 11, 2020, New York Governor Andrew Cuomo signed into law a new automatic renewal bill, S1475A. The new law **will go into effect on February 9, 2021**, and adds considerable requirements for businesses offering consumer-facing automatic renewal plans (i.e., paid subscriptions that automatically renew at the end of a certain term) or continuous service plans (i.e., paid subscriptions that continue until the consumer affirmatively cancels). Most notably, the new automatic renewal law ("ARL") requires businesses to:

- obtain consumers' "affirmative consent" to the offer terms before charging payments (any goods sent without such prior consent are deemed an "unconditional gift");
- "clear[ly] and conspicuous[ly]" disclose auto-renewal offer terms, including cancellation policies and minimum purchase obligations, "in visual proximity" to affirmative consent mechanism[1];
- "clear[ly] and conspicuous[ly]" disclose the offer terms and any material change thereto "in a manner capable of being retained by the consumer";
- offer user-friendly cancellation options, including an exclusively online option;
- send post-sale acknowledgement with material terms of auto-renewal offer; and
- for "free" trial offers, disclose cancellation options available to consumers before they have to pay for the goods or services.

As discussed in detail below, these changes impose significant new obligations on companies doing business in New York and offering goods or services on a

subscription or auto-renew basis. The requirements are modeled on key provisions in the Restoring Online Shoppers' Confidence Act ("ROSCA") and Negative Option Rule, both of which are enforced by the Federal Trade Commission ("FTC"), as well as stricter ARLs in other states, including California. To further complicate things, companies doing business in New York may have to comply with both the new ARL and the original one (and, of course, ARLs from federal law and other states in which they operate), as explained below.

Scope

The new ARL will apply to nearly all automatic renewal or continuous service plans, regardless of subject matter,[2] but only for consumer contracts; business-to-business contracts are excluded from the new ARL (but will still be governed by New York's original ARL). The statute provides a good-faith defense for businesses that can demonstrate a particular violation was "not intentional and resulted from a bona fide error made notwithstanding the maintenance of procedures reasonably adopted to avoid such error."

Enforcement

The new ARL authorizes New York's Attorney General to seek injunctions and fines up to $100 per violation, or up to $500 per "knowing violation," and up to $1,000 for multiple violations caused by a single act or incident. In addition, any goods sent without the required affirmative consent will be deemed an "unconditional gift" under the statute.

The statute does not explicitly grant a private right of action; however, courts in other states have allowed a private right of action for violations of similar ARLs by finding that consumers are permitted to sue under the state's other consumer protection statutes. As such, businesses that are covered by the new ARL can reasonably anticipate attempted consumer class action litigation based on violations thereof.

New York's Original ARL

Notably, New York's new ARL does not repeal the existing ARL, New York General Obligations Law § 5-903, which applies to both consumer and business-to-business

contracts, but only those "for service, maintenance, or repair to or for any real or personal property" for which the renewal period is longer than one month. The obligations imposed by the original ARL are less burdensome than the new ARL, as it requires only that businesses send (by personal delivery or certified mail) a written reminder of an automatic renewal 15-30 days prior to the terms' expiration.

Significance and Recommendations

With the passage of this new statute, New York is the latest in a growing contingency of states enacting more aggressive ARLs — many of which have been the basis for recent class action litigation. And because of the significant variance in requirements among states' ARLs, companies doing business in multiple states need to ensure that they take steps to comply with all of them. Companies doing business in states with strict ARLs like California, Vermont or the District of Columbia, may want to use the same automatic renewal practices used in those states in their contracts in New York. This approach makes particular sense given that these states' requirements are similar (though not identical) to New York's ARL. Additionally, for e-commerce companies doing business in many states, having different approaches in different states is likely impracticable, so adopting one consistent approach that complies with these states' more demanding ARLs likely makes the most sense from a logistics perspective.

In sum, New York's new ARL imposes significant new obligations on companies doing business in New York and offering to consumers goods or services on automatic renewal plans. And the potential costs for non-compliance are significant. Thus, to the extent not already done, businesses governed by New York's new ARL (or other similar state ARLs) should implement the practices described in the bullet points at the top of this *Alert* — and should do so by the ARL's February 9, 2021, effective date.

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1. There are similar provisions for auditory disclosures for offers conveyed solely via audio.↩

2. The following are exempted from the statute: services provided by a business or its affiliate where either the business or its affiliate is doing business pursuant to a franchise issued by a political subdivision of the state; entities regulated by the New York Department of Financial Services; banks, bank holding companies, or the subsidiary or affiliate of either, or credit unions or other financial institutions, licensed under state or federal law; and sellers and administrators of a service contract, as defined pursuant to N.Y. Ins. Law § 7902.↩

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