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February 03, 2022

2022 Compliance Landscape for Recurring Subscription Programs

Businesses that allow customers to sign up for automatically renewing subscriptions must comply with a patchwork of state and federal regulations. The Federal Trade Commission (FTC) recently issued an Enforcement Policy Statement Regarding Negative Option Marketing (Enforcement Policy) that addresses recurring subscription programs. In addition, California, Colorado, Delaware, and Illinois have each either passed new laws or amended existing laws on recurring subscriptions that go into effect in 2022. In this update, we highlight some key features of the Enforcement Policy and new and amended state laws.

FTC Enforcement Policy: The FTC recently issued the Enforcement Policy, which describes how the FTC might enforce against unfair and deceptive practices related to recurring subscription programs. The Enforcement Policy reiterates certain requirements under the Restore Online Shoppers' Confidence Act (ROSCA), such as: (1) clearly and conspicuously disclosing certain material terms of the transaction, (2) obtaining consumers' express, informed consent before charging them, and (3) providing simple and easy cancellation methods. However, the Enforcement Policy also suggests that the FTC is looking for brands to take actions beyond what is required by ROSCA. For example, the FTC suggests that material terms should be disclosed in all advertising related to the subscription (rather than just at point of sale) in a manner that is "unavoidable." The FTC also advises brands to "obtain the consumer's acceptance of the [recurring subscription] feature offer separately from any other portion of the entire transaction," which could indicate that the FTC prefers a separate mechanism (e.g., a check box) for agreement to recurring subscription terms.

State Laws: In addition to the new state requirements described below, various existing state laws impose requirements on businesses offering recurring subscriptions. For example, certain states require that businesses (1) clearly and conspicuously disclose certain recurring subscription terms at the point of sale, (2) obtain the customer's affirmative consent before charging for a subscription, (3) send an acknowledgement email to subscribers promptly after sign-up that includes certain subscription terms, (4) send subscribers a clear and conspicuous notice of any material changes to the subscription program, and (5) send subscription renewal reminders at specific intervals. The following updates highlight some of the more unique aspects of the new and updated state laws that go into effect this [year](#).

California amended its recurring subscription laws to add new notice and cancellation requirements, which will go into effect on July 1, 2022.

- **Renewal reminders.** Reminders will need to be sent to some California customers before their subscriptions renew. The requirement applies to customers enrolled in subscription plans with an initial subscription period of one year or longer. The reminders must include certain information about the subscription and how to cancel it, and it will need to be sent at least 15 and not more than 45 days before subscriptions renew.
- **Free or discounted trial reminders.** Reminders will also need to be sent to some California customers before the free or discounted trials they are enrolled in convert into a paid subscription. The requirement applies to customers enrolled in trial periods that are for a period longer than 31 days. The reminder must include certain information about when the payment obligation begins and how to cancel before the subscription begins and customer is charged, and it will need to be sent at least 3 and not more than 21 days before the trial period ends.
- **Cancellation procedure.** Under California's amended law, users who sign up online must be able to cancel their subscription online immediately and at will, without engaging in additional steps that obstruct or delay the ability to cancel. The customer must be able to cancel by either (1) a preformatted email made

immediately accessible to the consumer by the business that the consumer can send without adding additional information or (2) a prominently located direct link or button located in the customer's account, profile page, or within device or user settings.

Colorado's first law on automatically renewing subscriptions took effect on January 1, 2022.

- **Renewal reminders.** The new law requires that brands send reminder notices at least 25 and not more than 40 days before renewal of any annual contract and, for subscriptions with a term of less than a year, at least 25 and not more than 40 days before any renewal that extends the length of the contract beyond the first 12 months and any subsequent 12-month period. For example, for monthly subscriptions purchased on March 1, 2022, this notice must be sent at least 25 and not more than 40 days before the monthly renewal on March 1, 2023.
- **Cancellation procedure.** Businesses must provide Colorado customers enrolled in subscriptions a mechanism for cancellation that is "simple, cost-effective, timely, easy-to-use, and readily accessible."

Delaware's first law on automatically renewing subscriptions took effect on January 1, 2022

- **Renewal reminders.** Reminders must be sent to some Delaware customers before their subscriptions renew. Specifically, for subscription periods longer than 1 month where the renewal causes the subscription to extend more than 12 months after the subscription starts, the business must send renewal reminders for each renewal at least 30 days and not more than 60 days before the applicable cancellation deadline. The reminders must contain certain information about the subscription and how to cancel it. For example, if a business offers a recurring 6-month subscription, and the subscription can only be cancelled before the next 6-month period begins, it could send a renewal reminder 30 days before the beginning of the 13th month of subscription and then again 30 days before the end of each subsequent 6-month subscription period.
- **Cancellation procedure.** Businesses that allow customers to sign up for subscriptions online must allow Delaware customers to terminate their subscriptions online. The cancellation method offered must be "a cost-effective, timely, and easy to use."
- **Safe harbor.** Before initiating a private action under the Delaware law, customers must provide a business with notice of any alleged violation and a request to cancel the extension of the contract. No private action can be initiated against the business by the customer if, within 30 days of the notice being sent, the business cures the violation and provides applicable written statements to the customer and the director of consumer protection of the Delaware Department of Justice.

Illinois amended its recurring subscription law to add a new cancellation requirement, which took effect January 1, 2022.

- **Cancellation procedure.** Businesses that allow customers to sign up for subscriptions online must offer "cost-effective, timely, and easy-to-use" mechanisms for Illinois customers to terminate their subscriptions. Additionally, Illinois customers who sign up for subscriptions online must be allowed to cancel their subscriptions online.

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