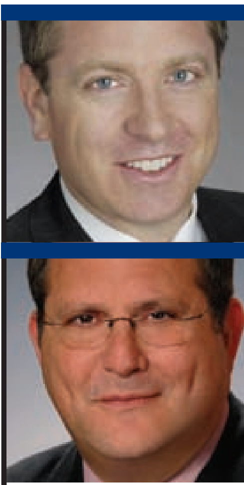

BY GREG SATER AND BENJAMIN ALEXANDER

How Will Negative Option Impact California?

If you are billing your customers on a recurring basis until they cancel, and are thereby operating a negative option or advanced consent continuity program, you would be well advised to keep a very close eye on the law right now—and not just federal law, but also the laws and the law enforcement activities of several states—because these days, the legal requirements and "best practices" that apply to your continuity program are evolving on an almost daily basis. What is compliant in one state may not be in another; what seemed like a best practice yesterday may be considered risky today; and tomorrow is at best, an educated guess.

The Golden State

By way of example, consider the brand new statute that just went into effect in California on Dec. 1, 2010.

California's new statute:

- Requires presenting the automatic renewal or continuous service offer terms in a clear and conspicuous manner before the subscription or purchasing agreement is fulfilled and in visual proximity to (or, in the case of an offer conveyed by voice, in temporal proximity to) the request that is made for the customer's consent to the offer (e.g., "Order Now" button);
- Prohibits charging the consumer's credit or debit card without first obtaining the consumer's affirmative consent to the agreement containing the automatic renewal offer terms or continuous service offer terms;
- Requires an acknowledgment (in a manner that is capable of being retained by the consumer) that includes the automatic renewal or continuous service offer terms, cancellation policy and information on how to cancel;
- Requires a toll-free telephone number, electronic mail address or some other cost-effective, timely and easy-to-use mechanism for cancellation.

The statute specifically requires the following disclosures to be made, and to be made clearly and conspicuously:

(1) That the subscription or purchasing agreement will continue until the consumer cancels;

(2) The description of the cancellation policy that applies to the offer;

(3) The recurring charges that will be charged to the consumer's credit or debit card as part of the automatic renewal plan or arrangement (*meaning*, in our view, the dollar amount that will be charged); and that the amount of the charge may later change, if that is the case, and the amount to which it will change, if known;

(4) The length of the automatic renewal term, or that the service is continuous; and

(5) The minimum purchase obligation, if any.

In terms of *how to present* the above-required disclosures in a "clear and conspicuous" manner, the statute says that they must be presented (and what follows is a direct quote from the statute) "in larger type than the surrounding text, or in contrasting type, font or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks, in a manner that clearly calls attention to the language." Thus, simply putting the disclosures in a separate paragraph on one's web page, for example, without also using a larger font, or a contrasting element, or setting that disclosure paragraph off by distinct markings, most likely will fail to comply with the California statute.

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If you've been following this, then you know that California's new statute is simply part of a larger trend, of late—increased regulatory scrutiny of negative option marketing programs. In the past year and a half, the industry has seen:

- FTC notice of proposed rulemaking, and comments to the FTC from state attorneys general (AG);
- New state statutes and proposed new state statutes in multiple states; and
- State AG and regulatory actions and litigation challenges in several states.

FTC Rulemaking

More specifically, on Jan. 25, 2007, the FTC hosted a workshop entitled "Negative Options: A Workshop Analyzing Negative Option Marketing," one result of which was a Division of Enforcement Staff Report in January 2009, including five principles for negative option marketing in compliance with the FTC Act. Then on May 11, 2009, the FTC published a notice of proposed rulemaking and solicited public comments on its negative option marketing rule. The clear message of the FTC's Staff Report and the rulemaking notice was that the FTC rule needed to be expanded. (The current FTC rule is limited to pre-notification plans, such as book and record clubs, that send notices of each automatic purchase before shipment.)

Comments to the FTC

A number of the comments received by the FTC suggested that in the view of several states at least, the FTC's proposed rulemaking did not go far enough. The AGs of Arkansas, Illinois, Kansas, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Mexico, Ohio, Oregon, Tennessee, Vermont and West Virginia joined in a letter from the Attorney General of Vermont, whose comments were introduced with:

> [W]e strongly encourage the FTC to expand the rule, but only if the revisions are adequate to ensure that consumer protections are put into place with respect to consent to be charged after the trial period, periodic notification of charges, maximum duration of charges, method of cancellation, and applicability of the rule, to services. Much of the public discussion of the [rule] has focused on improving *disclosure* as a way of protecting consumers from being harmed by trial conversion negative option marketing. {Citation omitted.]. However, in the context of free to pay conversions, it is our firm view that improved disclosure of terms will *not* adequately protect consumers. Rather, there is a need for *substantive* regulatory provisions to ameliorate the harmful aspects of this form of negative option plan. Therefore, we strongly encourage the FTC to add new provisions to the [rule] to regulate trial conversions….

California's new statute is simply part of a larger trend, of late—increased regulatory scrutiny of negative option marketing programs.

Colorado's Attorney General introduced his comments with almost the same language, differing only in his summary of suggested revisions. Perhaps the most far-reaching revisions were those suggested by Florida's Attorney General, which included proposals to require merchants consumer consent after the trial period and send reminders to consumers every six months. Clearly, this is a top priority for several state attorneys general.

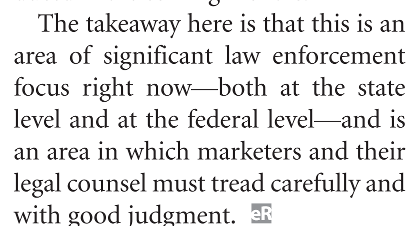
Other New State Statutes

Maine - "Free offers" to Maine consumers are prohibited, now, unless: (1) the merchant gets billing data directly from the consumer (i.e., no data pass), and (2) the merchant provides the consumer with clear and conspicuous information regarding the terms of the free offer, including any additional financial obligations that may be incurred as a result of accepting the free offer. "Free offer" means an offer of a rebate or of products or services without cost to a consumer by a seller under which, as a result of accepting the rebate, products or services, the consumer is required to contact the seller to avoid incurring a financial obligation for receiving additional products or services.

New York - A new law in New York requires that the material terms of any free trial offer be clearly and conspicuously disclosed and express consent obtained. In addition, under the law, prior to the cancellation deadline, notice of the deadline must be given within a specified window of time (15-30 days before trial ends in most cases). The NY law only applies to "free trials," a term that isn't defined in the law.

According to the MPA – The Association of Magazine Media (formerly the Magazine Publishers of America) bills regulating automatic renewal offers had failed to advance in Kentucky, New Hampshire, Mississippi, Oregon, Maryland and Rhode Island. However, such bills could be re-introduced in the coming months.

The takeaway here is that this is an area of significant law enforcement focus right now—both at the state level and at the federal level—and is an area in which marketers and their legal counsel must tread carefully and with good judgment. eR



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