

Date of Hearing: April 22, 2021

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION

Ed Chau, Chair

AB 390 (Berman) – As Amended April 12, 2021

SUBJECT: Advertising: automatic renewal and continuous service offers: notice and online termination

SUMMARY: This bill would require a business that makes an automatic renewal or continuous service offer (offer) to a consumer to provide the consumer with notice before the expiration of a free gift or trial, or temporary or promotional price, included with the offer, and would require these businesses to streamline the cancellation process in accordance with specified criteria. Specifically, effective July 1, 2022, **this bill would:**

- 1) Require a business that makes an offer to a consumer in this state to provide a consumer with a notice, as specified, that clearly and conspicuously states all of the following: (1) that the offer will automatically renew unless the consumer cancels; (2) the length and any additional terms of the renewal period; (3) one or more methods by which a consumer can cancel the service; (4) if the notice is sent electronically, a link that directs the consumer to the cancellation process, or another reasonably accessible electronic method that directs the consumer to the cancellation process if no link exists; and (5) contact information for the business.
- 2) Specify that a business shall provide a consumer with a notice as specified in 1), above, if the consumer accepted a free gift or trial, lasting for more than 31 days, that was included in an offer or the consumer accepted an offer at a promotional or discounted price, the applicability of which was more than 31 days; and further specify that in this case, the notice shall be provided at least three days before and at most 21 days before the expiration of the predetermined period of time for which the free gift or trial, or promotional or discounted price, applies.
- 3) Exempt from the notice requirement in 2), above, offers for which the consumer did not enter into the contract electronically and the business has not collected or maintained the consumer's valid email address, phone number, or other means of notifying the consumer electronically.
- 4) Provide that for the purposes of 2), above, "free gift" does not include a free promotional item or gift given by the business that differs from the subscribed product.
- 5) Specify that a business shall provide a consumer with a notice as specified in 1), above, if the consumer accepted an offer with an initial term of one year or longer that automatically renews unless the consumer cancels the service; and further specify that in this case, the notice shall be provided at least 14 days and not more than 31 days before the offer renews.
- 6) Require a business that allows a consumer to accept an offer online to allow the consumer to terminate the auto-renewal or continuous service exclusively online, at will, and without engaging in any further steps that obstruct or delay the consumer's ability to terminate the auto-renewal or continuous service immediately.

- 7) Require a business subject to 6), above, to provide a method of termination that is online in the form of either of the following: (1) a prominently located direct link or button which may be located within either a customer account or profile within either device or user settings; or (2) by an immediately accessible termination email formatted and provided by the business that a consumer can send to the business without additional information.
- 8) Clarify that the termination requirements pursuant to 6) and 7), above, apply only to the automatic renewal terms and continuous service terms of the contract and the remaining provisions of the contract continue to be governed by all applicable laws and regulations.
- 9) Provide that a business subject to the termination requirements pursuant to 6) and 7), above, may require a consumer to enter account information or otherwise authenticate before termination of the automatic renewal or continuous service if the consumer has an account with the business, and specify that a consumer who is unwilling or unable to enter account information or otherwise authenticate before termination of the service online shall not be precluded from terminating the consumer's service using another method.

EXISTING LAW:

- 1) Pursuant to the federal Restore Online Shoppers' Confidence Act, prohibits any person from charging or attempting to charge any consumer for any goods or services sold in a transaction effected on the internet through a negative option feature (i.e., opt-out), and requires that the person discloses the material terms of the transaction before obtaining a consumer's billing information, that the person obtains the consumer's express informed consent before charging the consumer's method of payment for products or services through that transaction, and that the person provides simple mechanisms for a consumer to stop recurring charges from being placed on their method of payment. (15 U.S.C. Sec. 8403.)
- 2) Expresses the intent of the Legislature to end the practice of ongoing charging of consumer credit or debit cards or third party payment accounts without the consumers' explicit consent for ongoing shipments of a product or ongoing deliveries of service. (Bus. & Prof. Code Sec. 17600.)
- 3) Prohibits a business making an automatic renewal offer or continuous service offer to a consumer from failing to present the offer terms in a clear and conspicuous manner before the subscription or purchasing agreement is fulfilled and in visual proximity, or in the case of an offer conveyed by voice, in temporal proximity, to the request for consent to the offer. (Bus. & Prof. Code Sec. 17602(a)(1).)
- 4) Requires, if an offer includes a free gift or trial, that the offer include a clear and conspicuous explanation of the price that will be charged after the trial ends or the manner in which the subscription or purchasing agreement pricing will change upon the conclusion of the trial. (*Ibid.*)
- 5) Prohibits a business from charging the consumer's credit or debit card, or the consumer's account with a third party, for an automatic renewal or continuous service without first obtaining the consumer's affirmative consent to the agreement containing the offer terms, including the terms of an offer that is made at a promotional or discounted price for a limited period of time. (Bus. & Prof. Code Sec. 17602(a)(2).)

- 6) Provides that in any case in which a business sends any products to a consumer under a continuous service agreement or automatic renewal of a purchase without first obtaining the consumer's affirmative consent, the products shall be deemed an unconditional gift to the consumer without any obligation whatsoever on the consumer's part to the business. (Bus. & Prof. Code Sec. 17603.)
- 7) Prohibits a business from failing to provide an acknowledgement that includes the offer terms, cancellation policy, and information regarding how to cancel in a manner that is capable of being retained by the consumer. (Bus. & Prof. Code Sec. 17602(a)(3).)
- 8) Requires, if the offer includes a free gift or trial, that the business also disclose in the acknowledgement how to cancel, and allow the consumer to cancel, the offer before the consumer pays for the goods or services. (*Ibid.*)
- 9) Requires a business that makes an offer to provide a toll-free telephone number, email address, postal address if the seller directly bills the consumer, or another cost-effective, timely, and easy-to-use mechanism for cancellation that is described in the acknowledgement. (Bus. & Prof. Code Sec. 17602(b).)
- 10) Requires that a consumer who accepts an offer online be allowed to terminate the service exclusively online. (Bus. & Prof. Code Sec. 17602(c).)
- 11) Requires that, in the case of a material change in the terms of an automatic renewal or continuous service that has been accepted by a consumer, the business shall 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 customer. (Bus. & Prof. Code Sec. 17602(d).)
- 12) Exempts from the provisions described above certain services, including: any service provided pursuant to a franchise issued by a political subdivision, as specified; any service provided by a business or its affiliate where either is regulated by the CPUC, the Federal Communications Commission, or the Federal Energy Regulatory Commission; any entity regulated by the Department of Insurance; alarm company operators; financial institutions; and service contract sellers and administrators regulated by the Bureau of Electronic and Appliance Repair. (Bus. & Prof. Code Sec. 17605.)

FISCAL EFFECT: None. This bill has been keyed non-fiscal by the Legislative Counsel.

COMMENTS:

- 1) **Purpose of this bill:** This bill seeks to protect consumers from unexpected and unwanted charges for automatic renewal or continuous services by requiring businesses to give notice before the expiration of a free gift or trial or a period of service provided at a promotional or discounted price, and by allowing a consumer to cancel an automatic renewal or continuous service online, at will, and without onerous cancellation requirements. This bill is author sponsored.

2) **Author's statement:** According to the author:

In response to the economic recession triggered by COVID-19, many individuals and families are searching for ways to save money so that they can buy food and pay rent. One of the first places they will turn is to cancel subscriptions for goods and services that they rarely or never use. Unfortunately, many businesses use a variety of tactics to make cancelling subscriptions inconvenient, confusing, time consuming, or otherwise difficult. [...]

During these challenging times, it is especially important that consumers can easily cancel subscriptions that they may no longer be able to afford. AB 390 would ensure that if consumers can subscribe online, they can cancel online, and that they can do so without delay or having to jump through hoops.

3) **Automatic renewal and continuous service offers may add convenience to service agreements, but may also be abused to the detriment of consumers:**

Automatic renewal agreements and continuous service agreements are two forms of contracts for the provision of services that continue indefinitely unless the one of the parties intervenes to terminate the agreement. In the case of automatic renewal agreements, the service is provided, and remuneration is garnished, for a definite term, but a new term begins automatically following one's expiration unless renewal is actively declined. Continuous service agreements lack a definite term, and instead continue indefinitely until a party actively terminates the agreement. In practice, these agreements often involve regular charges on a monthly or even yearly basis (e.g., media streaming services, health clubs, magazines), though other models exist where a fixed quantity of a good or service dictates the regularity of charges (e.g., FasTrak for toll booths).

With the potential the internet and improved logistics technology have provided for remote services and regular shipment, these types of agreements (henceforth referred to collectively as "auto-renewals") have increasingly pervaded most aspects of daily life. Many mobile applications are subscription-based, ranging from health and fitness apps to geographic information systems apps. Put simply, Californians have come to rely on subscription services for a plethora of good and services, including meal/ingredient delivery, entertainment, clothing selection and procurement, and even the regular replenishment of household goods, and a significant portion of these subscription services employ an auto-renewal model.

Auto-renewal is viewed by businesses as a valuable tool for both the business and the consumer, as it allows the consumer to maintain uninterrupted, and often highly convenient access to a good or service that they want or need, without the hassle of repeatedly submitting payment information. For businesses, auto-renewal facilitates the practicalities of customer retention. However, many consumer advocates contend that auto-renewals place a burden on consumers and are prone to abuse, both because consumers are often uninformed as to, or fail to fully comprehend, the nature of the agreement, and because the process for cancelling these agreements can be confusing, needlessly complex, or otherwise onerous.

4) **SB 340 (Yee, 2009) and SB 313 (Hertzberg, 2017) expanded consumer protections relating to auto-renewal, but left space for further improvement:**

In 2009, Governor Schwarzenegger signed into law SB 340 (Ch. 350, Stats. 2009), which established the intent of the Legislature to "end the practice of ongoing charging of consumer credit and debit

cards or third party payment accounts without the consumers' explicit consent for ongoing shipments of a product or ongoing deliveries of service." SB 340 defined several terms relating to automatic purchase renewals for the first time in California law, including the terms "automatic renewal" and "continuous service," and prohibited a wide array of exploitative practices relating to these agreements.

Specifically, SB 340, *inter alia*, rendered it unlawful for businesses making automatic renewal or continuous service offers to consumers in this state to do any of the following:

- Fail to present the offer terms in a *clear and conspicuous* manner, as defined, before the agreement is fulfilled and in close visual or temporal proximity to the request for consent to the offer. (Bus. & Prof. Code Sec. 17602(a)(1).)
- Charge the consumer's method of payment for an auto-renewal service without first obtaining the customer's affirmative consent to the terms of the agreement. (Bus. & Prof. Code Sec. 17602(a)(2).)
- Fail to provide an acknowledgement that includes the offer terms, cancellation policy, and information regarding how to cancel *in a manner that is capable of being retained by the consumer*. (Bus. & Prof. Code Sec. 17602(a)(3).)
- If the offer includes a free trial, fail to disclose in the acknowledgement how to cancel the service or fail to allow the consumer to cancel before the consumer pays for the goods or services. (*Ibid.*)
- Fail to provide a toll-free telephone number, email address, postal address (if the seller directly bills the consumer), or another cost-effective, timely, and easy-to-use mechanism for cancellation. (Bus. & Prof. Code Sec. 17602(b).)
- Fail to provide the consumer with clear and conspicuous notice of any material change in the terms of the offer that has been accepted by the consumer. (Bus. & Prof. Code Sec. 17602(c).)

Though SB 340 provided broad protections pertaining to auto-renewal agreements, some problematic practices, many of which are associated with free trials and promotional rates, were still identified in this space that were not regulated by its provisions. Businesses often provide free gifts, trials, promotions, or discounts in order to entice consumers to become fully paying customers, but many have apparently also exploited this practice to lull consumers into incidental charges as the trial transitions without notice into a paid subscription. SB 340 required that a business provide an acknowledgement to the consumer disclosing how to cancel the subscription with any free trial, and required that the consumer has an opportunity to cancel before paying for the goods or services. (Bus. & Prof. Code Sec. 17602(a)(3).) However, SB 340 did not specify the nature of the cancellation process. Following the passage of SB 340, several California court cases highlighted abuse of this omission. In 2014, the Santa Cruz and Santa Clara Counties' District Attorneys' Offices reached a \$1.8 million settlement with an online fashion retailer that imposed monthly fees on users of their website along with an extraordinarily difficult-to-use cancellation process, leading many to incur charges following free trial periods. In 2015, a \$2.5 million settlement was reached against LifeLock for failing to provide proper acknowledgement of the terms of

the trial and the cancellation process alongside the offer, and the same year, an \$80 million class action against security software company McAfee contended that the company used auto-renewal to improperly increase subscription prices.

In response to these ongoing issues, in 2017, Sen. Hertzberg introduced SB 313 (Ch. 356, Stats. 2017), which aimed to further protect consumers from harmful practices associated with auto-renewal. The bill provided that if an automatic renewal offer or continuous service offer includes a free gift or trial, the offer must include a clear and conspicuous explanation of the price that will be charged after the trial ends or the manner in which the pricing of the agreement will change upon conclusion of the trial. The bill also required that a consumer who accepts an auto-renewal offer online must be permitted to terminate the service exclusively online.

This bill seeks to expand and clarify the consumer protections provided by SB 340 and SB 313.

- 5) **AB 2811 (Berman, 2020) and opponent concerns:** Though absent from the chaptered law, earlier versions of SB 313 initially included a provision that would have required a business to provide a customer who has accepted an auto-renewal offer as part of an introductory or new customer offer, or free gift or trial, three to seven days' notice before the first charge to the consumer is made. It also would have required that, if provided electronically, the notice include a link that directs the consumer to the cancellation process. These provisions, among others, were removed from SB 313 in this Committee, with the Committee analysis noting technical concerns related to its practical application where the length of a promotional offer is based on reaching a threshold of consumption rather than a fixed length of time.

Technical concerns aside, the additional protections those provisions of SB 313 would have ensured remain timely, particularly in light of the conditions brought on by the COVID-19 pandemic. Since the effort to stave rising infection rates from COVID-19 settled on shelter-in-place orders and limitations on in-person business as key tenets of the public health response, subscription services providing entertainment, food, and other amenities have seen a dramatic increase in demand. In part, this increase in subscription services has likely resulted from general changes in lifestyle which have broadly affected consumption patterns¹, but it has also undoubtedly resulted in part from marketing efforts by these services. This increase in subscriptions, temporarily free or otherwise, may come at a serious cost to many consumers, making it imperative to provide sufficient consumer protections for these types of transactions.

As the California Low-Income Consumer Coalition points out in support of this bill:

From music streaming to meal kits, to diet, dating, and fitness apps, more and more consumers are subscribing to products and services online. In response to the economic impact of COVID-19, many Californians are searching for ways to save money. One of the first places they have turned is to cancel subscriptions for goods and services that they rarely or never use. Unfortunately, many businesses use a variety of tactics to make

¹ Susan Meyer, "Understanding the COVID-19 Effect on Online Shopping Behavior," *BigCommerce*, <https://www.bigcommerce.com/blog/covid-19-ecommerce/#understanding-panic-buying-and-coronavirus>, [as of Apr. 15, 2021].

cancelling subscriptions inconvenient, confusing, time-consuming, or otherwise difficult. During these challenging times, it is especially important that consumers can easily cancel subscriptions that they may no longer be able to afford.

AB 390 would bolster consumer protections by allowing consumers to cancel online immediately and at any time. For ease of cancellation, businesses would be required to provide a link or button on their website or a termination email for consumers to send to the business.

In 2020, the author of this bill introduced AB 2811, which reprised the notice provision struck from SB 313, along with amendments to address the aforementioned technical concerns, and further prescribed the nature of the cancellation process when a consumer, pursuant to SB 313, pursues cancellation online. Specifically, that bill would have required any business that allows a consumer to accept an auto-renewal service offer online, to also allow the consumer to cancel the service exclusively online, *at will, and without engaging any further steps that impact or restrict the consumer's ability to terminate the [auto-renewal] service immediately*. The bill would have specified that this capability must be provided either in the form of a direct link or button on the website, or a pre-drafted and formatted termination email provided by the business that can be sent to the business without supplying any additional information.

In response to AB 2811, opponents, which consisted primarily of groups representing business interests, argued that the meanings of “immediately” and “without engaging any further steps” were vague, and made it unclear whether a business could require the consumer to authenticate prior to cancellation. Opponents also pointed out that in many cases, businesses elect to reach out to the consumer before completing cancellation to negotiate possible customer retention through additional discounts, and this would have precluded that practice. Opponents took further issue with the button/email mandate, opining it to be overly prescriptive and an impediment to creative solutions that are even more consumer-friendly for cancellation, and identified the inability for businesses providing promotions/trials lasting fewer than three days to comply with the notice requirement. AB 2811 passed out of this Committee unanimously, and received only a single “no” vote on the Assembly Floor. Due in part to the constraints on the legislative process imposed by the COVID-19 pandemic, however, AB 2811 died in the Senate Judiciary Committee without receiving a hearing.

- 6) **AB 390 would provide most consumer protections proposed in AB 2811, with several modifications to accommodate industry concerns:** AB 390 was introduced with language identical to the final version of AB 2811, and consequently faced similar opposition arguments. Since then, the author has worked extensively with stakeholders in an attempt to address their concerns to the extent possible without profoundly compromising the utility of the bill. AB 390 would replace the three to seven day notice from AB 2811 with two separate, mutually exclusive notice requirements: one for circumstances in which a consumer accepts an auto-renewal offer with a free gift or trial, or promotional or discounted price, that applies for more than 31 days; and another for circumstances in which a consumer accepts an auto-renewal offer with an initial term of one year or longer. In the former case, the bill would require the notice to be provided no fewer than three days and no more than 21 days prior to the expiration of the promotion; in the latter case, the notice would need to be

provided no fewer than 14 days and no more than 31 days prior to the initial renewal of the service.

The bill would specify that in the event both conditions apply, only the latter notice (i.e., 14-31 days before renewal) is required, and that contracts that are not entered into online are not subject to the first notice requirement (i.e., 3-21 days before end of promotion) if the business has not collected or maintained the consumer's phone number or electronic contact information. These notices would include a statement that the service will automatically renew unless cancelled, the length and any additional terms of the renewal period, one or more methods by which a consumer can cancel the service, the contact information for the business, and, if the notice is sent electronically, a link directing the consumer to the cancellation process, or another reasonably accessible electronic method that directs the consumer to the cancellation process if no link exists.

In addition, like AB 2811, AB 390 would prescribe conditions to streamline the online cancellation process, including requiring a business that allows a consumer to accept an auto-renewal offer online permit the consumer to terminate the auto-renewal or continuous service exclusively online *at will, and without engaging in any further steps that obstruct or delay the consumer's ability to terminate the auto-renewal or continuous service immediately*. The bill would specify that the online method of termination must be in the form of either: (1) a prominently located direct link or button which may be located within either a customer account or profile, or within either device or user settings; or (2) an immediately accessible termination email formatted and provided by the business that a consumer can send to the business without additional information. The bill would allow a business subject to these conditions to require a consumer to enter account information or otherwise authenticate before termination of the auto-renewal or continuous service if the consumer has an account with the business, but would provide that a consumer who is unwilling or unable to enter account information or otherwise authenticate shall not be precluded from terminating using another method. All of the bill's provisions would not go into effect until July 1, 2022.

The bill does not attempt to address opposition arguments that AB 2811's button/email mandate may interfere with innovation in user interface for cancellation, nor does it address complaints regarding the inability for a business to negotiate with a cancelling consumer. Staff notes, however, that it is difficult at this time to imagine a mechanism for cancellation easier to carry out than the click of a button, and that it would be difficult to allow businesses to reach out to negotiate with consumers prior to completing cancellation in a manner that does not add an additional burden to a consumer who is certain they wish to cancel.

In support of the bill, the Office of the District Attorney of Santa Cruz County argues:

This office, as a member of the California Auto Renewal Task Force (CART), which includes the District Attorney Offices of San Diego, Los Angeles, Santa Cruz, Santa Clara, and the City Attorney of Santa Monica, is actively engaged in multiple actions enforcing the California Automatic Renewal Law (ARL) which [AB 390] seeks to strengthen. We consider ourselves experts in the application and enforcement of the ARL.

Following amendments to the law to require that when automatically renewing contracts are formed online, consumers be able to likewise cancel online, we have observed a number of unscrupulous businesses adopt a tactic of requiring customer service chat

dialogues or the filling out of surveys as a prerequisite to effectuate a cancellation. This tactic is used to introduce obstacles to the ability of the consumer to cancel and to dissuade the consumer from efficiently cancelling an automatically renewing contract. Such conduct, in addition to being unfair to consumers is also a form of unfair competition with other businesses that have effective and efficient cancellation mechanisms. Consumers who can form a contract with the touch of a button online should be able to cancel with similar ease.

AB 390 directly addresses this situation eliminating an unforeseen loophole under current law and adds additional notice requirements to the consumer that are valuable.

The Consumer Attorneys of California add in support:

The subscription market is rapidly growing in the United States, growing more than 100% per year for the last five years. More than one-third of consumers have three or more subscriptions according to a McKinsey and Company market study. That study also found that in 2016, the largest retailers generated more than 2.6 billion in sales.

Despite some protections in current law, businesses make it difficult for consumers to cancel these services online. Current law states that a customer who accepts an automatic renewal or continuous service online must be allowed to cancel the automatic renewal exclusively online. Despite that law there are many examples of companies that require consumers to jump through hoops like contacting a representative through an online chat or texting a consumer representative. [...] AB 390 would ensure Californians are better informed about when and how much they are being charged for subscription services and will remove barriers to cancelling online subscriptions.

- 7) **Arbitrary notice periods and exclusions seem to weaken protections relative to AB 2811, but improve the status quo on balance:** The author appears to have targeted changes from the content of AB 2811 primarily at opposition complaints that a three to seven day notice is impractical in certain circumstances, including short promotions and notices that cannot, for various reasons, be provided electronically. The bill in print attempts to accommodate these concerns by exempting entirely from the notice requirement² any promotional offer that does not exceed 31 days and any offer for which the contract is not entered into electronically if the business has not collected or maintained the consumer's valid email address, phone number, or another means of notifying the consumer electronically. The bill in print also significantly lengthens the window for notice compared to AB 2811, allowing for notice to be sent no fewer than three and no more than 21 days prior to the termination of the promotion.

These provisions in concert seem to exceed the measures necessary to accommodate the specific concerns of the bill's opponents, and generally reduce the utility of the protections the bill seeks to provide. In particular, the exclusion of trials that do not exceed 31 days would likely exclude the overwhelming majority of promotions from the notice requirement. According to a report by Redpoint Ventures, a marketing strategies firm, 14 day trials are by

² The exclusions discussed here apply only to the notice requirement for promotional offers (i.e. 3-21 days before end of promotion). These exclusions would not apply to the notice requirement for offers with an initial term of one year or longer (i.e. 14-31 days before first renewal), where applicable.

far the most popular length used in business-to-consumer commerce, constituting the majority of trials offered, with 30 day trials as the second most common.³ Furthermore, the notice window of three to 21 days seems both impractical and arbitrary. If, for example, a promotional rate was provided for six weeks (i.e., 42 days), the notice for cancellation could be provided just halfway through the duration of the promotion. At this point, it is unlikely to provide much value to the consumer, since the consumer is not likely to retain the information therein for a full three weeks, nor is the consumer likely to cancel their trial on the spot with half of its duration, and their assessment of the product still remaining. The breadth of the notice window may also cause confusion on the part of consumers. The particular benefit of a three-day notice for prompting immediate user action differs considerably from the utility of a 21-day notice, making it difficult for consumers to develop a reliable sense for how to respond to these notices and what they specifically indicate with respect to the impending expiration of the trial.

In contrast, a coalition of industry groups opposing the bill, including TechNet, CalChamber, the California Newspaper Publishers Association, and the Association of Magazine Media argue that the notice window in the bill in print is too short:

AB 390 would require a specific three to twenty-one day notice before taking payment that would be a significant burden on businesses, while potentially inundating consumers with notices they would ignore, especially in the case of short trials. This notice requirement was also contemplated in SB 313 and was removed from the bill because it was unnecessary, especially in the case of recently entered into agreements because the consumer will have just received a retainable acknowledgement based on current law [...]

The notice window is also almost impossible to achieve reliably by mail in the current environment. This time window also differs unnecessarily from reminder notices [*sic.*] periods under other state laws, and is unworkable for short term subscriptions.

Staff notes that this Committee's analysis of SB 313 cites concerns regarding feasibility of compliance for consumption-based promotional models as the reason for striking the notice requirement, not its lack of utility. Staff further notes that the bill in print explicitly exempts trials of 31 days or less, potentially allaying concerns regarding the receipt of the recent acknowledgement based on current law in the case of short trials. The bill also exempts from this notice requirement any offer for which the contract was not entered into electronically if the business lacks the consumer's electronic contact information or phone number. This effectively exempts circumstances that would otherwise require notice by mail, seemingly making an accommodation for the feasibility of analog notice unnecessary with respect to this notice window.

For these reasons, if this Committee passes this bill, as the bill moves through the legislative process, the author may consider shortening this window for providing notice to a minimum of three and a maximum of 14 days prior to the termination of the promotion, thereby strengthening the utility of the notice, and ensuring that the notice is not received in

³ See "What's the ideal SaaS free trial length?" *The Mobile Spoon*, Jul. 21, 2020, <https://www.mobilespoon.net/2020/07/ideal-saas-free-trial-length.html>, [as of Apr. 16, 2021].

unnecessarily close temporal proximity to the retainable acknowledgement, as opponents suggest.

Opponents of the bill similarly raise concerns with the duration of the notice window for auto-renewals with an initial term longer than one year, which, in the bill in print, is 14-31 days prior to the automatic renewal. The aforementioned coalition contends:

If [the notice requirement for auto-renewals with an initial term longer than one year] is going to be added to state law, the notification parameters should be consistent with other states to avoid a patchwork of differing notification windows which would be 60 days on the upper limit rather than 31 days. There is no discernable reason to create additional burdens on companies offering California residents convenient auto renewal provisions by creating outlier provisions in this way.

Currently, state auto-renewal laws are a patchwork across the country, differing in terms of prescribed requirements and applicability, and with many states having none at all. It is true that the majority of states with auto-renewal laws requiring notice prior to the renewal of contracts with a long initial term generally provide a notice window with an upper limit of 60 days, but many of these laws provide a notice window of 30-60 days. The upper limit of 60 days is also not universal across existing auto-renewal laws. North Carolina, for instance, provides a notice window of 15-45 days for any auto-renewal contract with a term longer than 60 days. (N.C. Gen. Stats. Ch. 75, Sec. 75-41(a)(3).) Staff notes that this Legislature has consistently provided for stronger consumer protections relative to other states where it sees fit, and that the same concerns relating to utility of wider and earlier notice requirements that apply in the case of the 3-21 day notice are similarly relevant to this notice. That said, the notice for auto-renewal contracts with initial terms longer than one year does not provide the same exclusion for contracts that are not entered into online and for which the business lacks the consumer's electronic contract information and phone number, meaning notices by mail may be necessary. To accommodate the practicalities of this need while maximizing utility to consumers, if this Committee passes this bill, as the bill moves through the legislative process, the author may consider adjusting this notice window to 15-45 days, consistent with North Carolina's requirement.

Nonetheless, on balance, AB 390 seems to provide critical protections for consumers beyond the status quo that would streamline cancellation and help prevent predatory uses of auto-renewal.

- 8) **Related legislation:** AB 1221 (Flora) would clarify that service contracts can cover a single product or a class of products, and would provide explicit authorization for a service contractor to enter into automatically renewing month-to-month service contracts with consumers, subject to certain requirements.
- 9) **Prior legislation:** AB 2811 (Berman, 2020) *See* Comment 5.

SB 313 (Hertzberg, Ch. 356, Stats. 2017) *See* Comment 4.

SB 1428 (Hernández, 2016) would have required a business to honor a consumer's request to cancel an automatic renewal or continuous service offer within 24 hours of receipt. The bill was referred to the Assembly Privacy and Consumer Protection Committee but was not taken up for a hearing.

AB 2867 (Gatto, 2016) would have required a cable, satellite or internet service provider that enables an individual to subscribe to its services online to cancel a subscription online as well. The bill reached the Assembly Floor but was not voted upon.

SB 340 (Yee, Ch. 350, Stats. 2009) *See Comment 4.*

REGISTERED SUPPORT / OPPOSITION:

Support

Alameda County District Attorney's Office
California Low-income Consumer Coalition
Consumer Attorneys of California
Santa Clara County District Attorney's Office (to previous version)
Santa Cruz County District Attorney's Office

Opposition

Association of National Advertisers (unless amended)
California Chamber of Commerce (unless amended)
California Newspaper Publishers Association (unless amended)
Entertainment Software Association (unless amended)
International Health, Racquet & Sports Club Association (to previous version)
Internet Association (unless amended)
Internet Coalition (unless amended)
Motion Picture Association (unless amended)
MPA - the Association of Magazine Media (unless amended)
TechNet (unless amended)

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