

**SENATE JUDICIARY COMMITTEE**  
**Senator Thomas Umberg, Chair**  
**2021-2022 Regular Session**

AB 390 (Berman)  
Version: June 14, 2021  
Hearing Date: June 22, 2021  
Fiscal: No  
Urgency: No  
CK

**SUBJECT**

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

**DIGEST**

This bill makes it unlawful for a business that makes an automatic renewal offer or continuous service offer to a consumer in this state to fail to provide a notice, as required, that explains the automatic renewal details and the process for cancellation. The bill also requires a business to allow a consumer to terminate the offers at will and without engaging in any further steps, in addition to other requirements.

**EXECUTIVE SUMMARY**

An “automatic renewal” is a plan or arrangement in which a paid subscription or purchasing agreement is automatically renewed at the end of a definite term for a subsequent term. “Continuous service” is defined as a plan or arrangement in which a subscription or purchasing agreement continues until the consumer cancels the service. Existing law lays out a series of consumer protective requirements for businesses that make available automatic renewal offers or continuous service offers. For instance, they require certain notifications before renewals occur and require notices of the clear terms and conditions of such offers.

Building on those laws, this bill provides that it is unlawful for any business that makes an automatic renewal offer or continuous service offer to a consumer to fail to provide the consumer with a notice, within specified time frames that explains the offer and the cancellation process, in certain circumstances, such as where the initial offer was free or discounted for a period of time. It also requires more streamlined cancellation procedures. The measure is sponsored by the author. It is supported by various district attorneys and consumer groups. It is opposed by a coalition of technology associations, advertisers, and other business groups.

**PROPOSED CHANGES TO THE LAW**

Existing law:

- 1) 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 § 17600.)
- 2) Defines "automatic renewal" as a plan or arrangement in which a paid subscription or purchasing agreement is automatically renewed at the end of a definite term for a subsequent term. "Continuous service" is defined as a plan or arrangement in which a subscription or purchasing agreement continues until the consumer cancels the service. (Bus. & Prof. Code § 17601(a) & (e).)
- 3) Makes it unlawful for any business that makes an automatic renewal offer or continuous service offer to a consumer in this state to fail to present the automatic renewal offer terms or continuous service 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. If the offer also includes a free gift or trial, the offer shall 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 conclusion of the trial. (Bus. & Prof. Code § 17602(a)(1).)
- 4) Prohibits charging a 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 automatic renewal offer terms or continuous service offer terms, including the terms of an automatic renewal offer or continuous service offer that is made at a promotional or discounted price for a limited period of time. (Bus. & Prof. Code § 17602(a)(2).)
- 5) Requires businesses making these offers to provide an acknowledgment that includes the automatic renewal offer terms or continuous service offer terms, cancellation policy, and information regarding how to cancel in a manner that is capable of being retained by the consumer. If the automatic renewal offer or continuous service offer includes a free gift or trial, the business shall also disclose in the acknowledgment how to cancel, and allow the consumer to cancel, the automatic renewal or continuous service before the consumer pays for the goods or services. (Bus. & Prof. Code § 17602(a)(3).)

- 6) Requires a business that makes an automatic renewal offer or continuous service offer to provide a toll-free telephone number, electronic mail address, a postal address if the seller directly bills the consumer, or it shall provide another cost-effective, timely, and easy-to-use mechanism for cancellation that shall be described in the acknowledgment specified above. A consumer who accepts an offer online shall be allowed to terminate it exclusively online, which may include a termination email formatted and provided by the business that a consumer can send to the business without additional information. (Bus. & Prof. Code § 17602(b), (c).)
- 7) Provides that the requirements apply only prior to the completion of the initial order for the automatic renewal or continuous service, except as provided. (Bus. & Prof. Code § 17602(e).)
- 8) Establishes, the federal Restore Online Shoppers' Confidence Act, which prohibits certain unfair and deceptive internet sales practices, restricts negative option marketing, and provides for both federal and state enforcement. (15 U.S.C. § 8401 et seq.)

This bill:

- 1) Makes it unlawful for any business that makes an automatic renewal offer or continuous service offer to a consumer in this state to fail to provide a notice, where required, that conspicuously states all of the following:
  - a) that the automatic renewal or continuous service will automatically renew unless the consumer cancels;
  - b) the length and any additional terms of the renewal period;
  - c) one or more methods by which a consumer can cancel the automatic renewal or continuous service;
  - d) if the notice is sent electronically, the notice shall include either 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
  - e) contact information for the business.
- 2) Requires the above notice in either of the following situations:
  - a) the consumer accepted a free gift or trial, lasting for more than 31 days, that was included in an automatic renewal offer or continuous service offer or the consumer accepted an automatic renewal offer or continuous service offer at a promotional or discounted price, and the applicability of that price was more than 31 days; or
  - b) the consumer accepted an automatic renewal offer or continuous service offer with an initial term of one year or longer, that automatically renews unless the consumer cancels the automatic renewal or continuous service.

- 3) Requires a notice in connection with (2)(a) shall be provided at least 3 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. However, the offer is exempt if the consumer does not enter into the contract electronically and the business has not collected or maintained the consumer's valid email address, phone number, or another means of notifying the consumer electronically. "Free gift" does not include a free promotional item or gift given by the business that differs from the subscribed product.
- 4) Requires a notice in connection with (2)(b) to be provided at least 15 days and not more than 45 days before the automatic renewal offer or continuous service offer renews. If a notice is required under both (2)(a) and (2)(b), only the notice in this paragraph is required. These requirements can be fulfilled after completion of the initial order.
- 5) Requires, in addition to the above notice requirements, a business that allows a consumer to accept an automatic renewal or continuous service offer online to allow a consumer to terminate the automatic renewal or continuous service exclusively online, at will, and without engaging any further steps that obstruct or delay the consumer's ability to terminate the automatic renewal or continuous service immediately. The business shall provide a method of termination that is online in the form of either of the following:
  - a) 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
  - b) by an immediately accessible termination email formatted and provided by the business that a consumer can send to the business without additional information.
- 6) Applies these termination requirements only to the automatic renewal terms and continuous service terms of the contract. The remaining provisions of the contract continue to be governed by all applicable laws and regulations.
- 7) Authorizes a business to require a consumer to enter account information or otherwise authenticate online before termination of the automatic renewal or continuous service online if the consumer has an account with the business. A consumer who is unwilling or unable to enter account information or otherwise authenticate online before termination of the automatic renewal or continuous service online shall not be precluded from authenticating or terminating the automatic renewal or continuous service offline using another method, as provided.
- 8) Provides that these changes become operative on July 1, 2022.

## COMMENTS

### 1. Consumer protections and automatically renewing offers

When businesses began using automatic renewals for subscriptions and purchase agreements for products and services, consumer complaints began to surface regarding those automatic renewals. Consumers complained that they were unaware of and had not requested the automatic renewals until they either received a bill or a charge on their credit card. A particularly egregious example of the misuse of automatic service renewals manifested when Time, Inc. was investigated by the Attorneys General of 23 states. The investigation found Time failed to properly disclose the terms of its agreements and used misleading offers. In the wake of the investigation and subsequent settlement, California enacted SB 340 (Yee, Ch. 350, Stats. 2009) to address these issues and deter such practices.

SB 340 sought 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.” The law defines “automatic renewal” as “a plan or arrangement in which a paid subscription or purchasing agreement is automatically renewed at the end of a definite term for a subsequent term.” “Continuous service” is defined as “a plan or arrangement in which a subscription or purchasing agreement continues until the consumer cancels the service.”

Businesses were required to “present the automatic renewal offer terms or continuous service 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.” Businesses were also required to obtain a consumer’s affirmative consent to the agreement containing the terms of the automatic renewal or continuous service before charging the consumer. Businesses had to provide an acknowledgment that includes the terms of the offers, the relevant cancellation policy, and “information regarding how to cancel in a manner that is capable of being retained by the consumer.” There is a special provision for offers that include a free trial, requiring the business to also disclose how to cancel and to allow the consumer to do so before the consumer pays for the goods or services. When a business makes an automatic renewal or continuous service offer, it must further provide (1) a toll-free telephone number, (2) an e-mail address, (3) a postal address, or (4) “another cost-effective, timely, and easy-to-use mechanism for cancellation.”

Despite the requirements imposed by SB 340, there were still concerns that consumers were not adequately protected from the pitfalls these practices presented. Lawsuits suggested that businesses were pushing the envelope with what was lawful, and consumers were continuing to face hurdles in cancelling agreements or fully

deciphering what the terms of those agreements are. To address these issues, SB 313 (Hertzberg, Ch. 356, Stats. 2017) was enacted. It inserted additional consumer protections regarding price, terms, and cancellation to ensure consumers are entering into these types of agreements fully informed and properly enabled to cancel if they so wish.

If an automatic renewal offer or continuous service offer includes a free gift or trial, SB 313 requires 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 conclusion of the trial. The bill also extended the requirement regarding an acknowledgement in Business and Professions Code Section 17602(a)(3) to offers that include gifts rather than just offers that include free trials.

The bill clarifies that before charging a consumer a business must obtain the consumer's affirmative consent to the agreement containing the terms of the automatic renewal or continuous service, including the terms of an automatic renewal offer or continuous service offer that is made at a promotional or discounted price for a limited period of time. It also provides that a consumer who accepts an automatic renewal or continuous service offer online shall be allowed to terminate the automatic renewal or continuous service exclusively online, which may include a termination email formatted and provided by the business that a consumer can send to the business without additional information.

## 2. Adding additional layers of protection

With the ubiquity of automatically renewing subscriptions and services, usually after an initial free trial period, most can provide at least anecdotal evidence of the difficulty facing consumers when they try to cancel before an automatic renewal kicks in, or even fully understand the automatic renewal process in the first place.

The author highlights anecdotal reports of members and staff who have struggled to cancel an online newspaper subscription or a fitness class subscription as companies require consumers to go through a byzantine process to opt out.

This bill again seeks to bolster the protections around these automatically renewing offers, which can be convenient for businesses and consumers alike, but can also be misleading and predatory.

### *a. Notice*

The bill implements an element of SB 313 that was removed along its path through the Legislature. SB 313 would have initially required a business to provide a consumer who has accepted an automatic renewal offer or continuous service offer as part of accepting

an introductory or new customer offer, or a free gift or trial, 3 to 7 days' notice before the first charge to the consumer. This bill requires a similar notice to be sent to consumers that conspicuously states the following:

- that the automatic renewal or continuous service will automatically renew unless the consumer cancels;
- the length and any additional terms of the renewal period;
- one or more methods by which a consumer can cancel the automatic renewal or continuous service;
- if the notice is sent electronically, the notice shall include either 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 contact information for the business.

This information will ensure that consumers fully comprehend the offer before them and are clearly provided an easy method of cancelling if they so choose. This notice is required in two situations.

First, the notice is required if the consumer accepted a free gift or trial, lasting for more than 31 days, that was included in an automatic renewal offer or continuous service offer or the consumer accepted an automatic renewal offer or continuous service offer at a promotional or discounted price, and the applicability of that price was more than 31 days, except as provided. In these situations, the notice shall be provided at least 3 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.

It should be noted that this trigger for the notice is limited, given it does not apply to trials of one month or less. Many free trials are for the initial month and automatically renew after that. The author may wish to consider whether the protections afforded by the notice are important enough to extend to situations where a consumer is given an initial trial offer, regardless of the length.

The notice is also required where the consumer accepted an automatic renewal offer or continuous service offer with an initial term of one year or longer, that automatically renews unless the consumer cancels the automatic renewal or continuous service. In this case, the notice shall be provided at least 15 days and not more than 45 days before the automatic renewal offer or continuous service offer renews. Recent amendments to the bill provided additional flexibility in the parameters of this acceptable time range. In the situation where an offer meets both conditions, only this latter provision of notice is required.

These timelines are gauged to give consumers meaningful notice in temporal proximity to the automatic renewal, fostering intentional and knowing acceptance of the impending renewal.

The author makes the case for why such changes are necessary:

At a time when millions of Californians are struggling to recover financially from the COVID-19 pandemic-induced economic slowdown, many are searching for ways to save money for necessities such as groceries and rent. One likely option 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 Californians are better informed about when and how much they are being charged and make it easier to cancel online without having to jump through hoops.

A coalition of groups, including various technology and media associations, write in opposition to this notice requirement:

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. . . . An additional notice in a specific time window containing the same information the consumer just received is unwarranted. Studies show that consumers develop notice “fatigue” when overwhelmed with too many notices and they ignore them and therefore, it seems likely that prescribing this specific type and method of providing notice will be ineffective.

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 periods under other state laws, and is unworkable for short term subscriptions.

*b. Cancellation method*

Existing law provides that “a consumer who accepts an automatic renewal or continuous service offer online shall be allowed to terminate the automatic renewal or continuous service exclusively online, which may include a termination email formatted and provided by the business that a consumer can send to the business without additional information.” (Bus. & Prof. Code § 17602.)

The bill strengthens this provision and requires businesses to allow consumers to terminate the automatic renewal or continuous service not only exclusively online, but also at will and without engaging any further steps that obstruct or delay the consumer’s ability to terminate the automatic renewal or continuous service immediately.



Furthermore, the business is required to provide one of two specified, online methods of termination. The business can still provide the termination email formatted and provided by the business that a consumer can send to the business without additional information, however, it must now be “immediately accessible,” so as not to allow for a business to bury it in terms and conditions or elsewhere on a website. The other option is to include 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.

The bill also makes clear that these termination requirements only apply to the automatic renewal or continuous service terms of the contract and the remaining provisions continue to be governed by all applicable laws and regulations.

The California Low-Income Consumer Coalition expresses its support for these changes: “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.”

The coalition in opposition states its concerns with the new streamlined cancellation methods:

The language of AB 390 is unclear regarding the intent of “immediate” cancellation. Consumers should not be able to abuse free trial or subscription agreements that allow them to take advantage of preferential rates, but then have a right to cancel in the middle of a subscription term. This creates significant economic concerns for businesses given that these types of subscriptions are often priced based on the term of the subscription. We appreciate language added by the author in recent amendments to clarify that the underlying contract is not impacted, but it would be more appropriate to clarify in the law that the cancellation of the autorenewal [*sic.*] takes effect at the end of the billing cycle.

The Santa Cruz County District Attorney’s Office writes in support. The office is a member of the California Auto Renewal Task Force, along with the district attorney’s offices in San Diego, Los Angeles, Santa Clara, and the City Attorney of Santa Monica. The Santa Cruz office writes:

[W]e 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 the current law and adds additional notice requirements to the consumer that are valuable.

However, its support is “with qualification,” as it has concerns with the provision of the bill that authorizes a business to require the consumer to enter account information or otherwise authenticate online before termination online if the consumer has an account. It expresses concern that this could allow for “a potential return to the dissuasion tactic employed by unscrupulous businesses.”

It should be noted that this provision also provides that even where a consumer is unwilling or unable to enter account information or otherwise authenticate online before termination, the consumer cannot be precluded from authenticating or terminating the automatic renewal or continuous service using another method, as provided.

#### **SUPPORT**

Alameda County District Attorney Nancy O’Malley  
California Low-Income Consumer Coalition  
Consumer Action  
Consumer Attorneys of California  
Santa Clara County District Attorney Jeff Rosen  
Santa Cruz County Assistant District Attorney Douglas Allen

#### **OPPOSITION**

Association of National Advertisers  
California Chamber of Commerce  
California Newspaper Publishers Associations  
Internet Association

#### **RELATED LEGISLATION**

Pending Legislation: AB 1221 (Flora, 2021) requires a service contract that continues until canceled by the buyer or service contractor to, among other things, disclose to the buyer in a clear and conspicuous manner that the service contract shall continue until canceled by the buyer or service contractor and provide a toll-free number, email address, postal address, and, if one exists, internet website the buyer can use to cancel the service contract. The bill is currently in the Senate Judiciary Committee.

Prior Legislation:

AB 2811 (Berman, 2020) was substantially similar to this bill, providing for a consumer notice and more streamlined cancellation of automatic renewal and continuous service offers. The bill was not heard in the Senate Judiciary Committee as a result of the COVID-19 pandemic.

SB 313 (Hertzberg, Ch. 356, Stats. 2017) *See* Comment 1.

SB 340 (Yee, Ch. 350, Stats. 2009) *See* Comment 1.

**PRIOR VOTES:**

Assembly Floor (Ayes 72, Noes 1)

Assembly Privacy and Consumer Protection Committee (Ayes 11, Noes 0)

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