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I N  S E N A T E

April 26, 2010

Introduced by Sen. PERALTA -- (at request of the Consumer Protection Board) -- read twice and ordered printed, and when printed to be committed to the Committee on Consumer Protection

AN ACT to amend the general business law, in relation to automatic renewal and continuous service offers, and repealing section 5-903 and subdivision 11 of section 1-203 of the general obligations law, relating to automatic renewal contracts for service

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The general business law is amended by adding a new section 348 to read as follows:

S 348. AUTOMATIC RENEWAL AND CONTINUOUS SERVICE OFFERS. 1. FOR THE PURPOSES OF THIS SECTION, THE FOLLOWING DEFINITIONS SHALL APPLY:

(A) "AUTOMATIC RENEWAL" MEANS A PAID SUBSCRIPTION OR PURCHASING AGREEMENT THAT IS AUTOMATICALLY RENEWED AT THE END OF A DEFINITE TERM FOR A SUBSEQUENT TERM.

(B) "CLEAR AND CONSPICUOUS" OR "CLEARLY AND CONSPICUOUSLY" MEANS IN LARGER TYPE THAN THE SURROUNDING TEXT, 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. IN THE CASE OF AN AUDIO DISCLOSURE, "CLEAR AND CONSPICUOUS" AND "CLEARLY AND CONSPICUOUSLY" MEANS IN A VOLUME AND CADENCE SUFFICIENT TO BE READILY AUDIBLE AND UNDERSTANDABLE.

(C) "CONSUMER" MEANS ANY NATURAL PERSON WHO SEEKS OR ACQUIRES, BY PURCHASE OR LEASE, ANY GOODS OR SERVICES FOR PERSONAL, FAMILY OR HOUSEHOLD PURPOSES.

(D) "CONTINUOUS SERVICE" MEANS A PLAN OR ARRANGEMENT IN WHICH A SUBSCRIPTION OR PURCHASING AGREEMENT CONTINUES UNTIL THE CONSUMER CANCELS SUCH SERVICE.

2. AN AUTOMATIC RENEWAL OR CONTINUOUS SERVICE OFFER MUST CONTAIN THE FOLLOWING TERMS, WHICH SHALL BE CLEARLY AND CONSPICUOUSLY DISCLOSED TO THE CONSUMER:

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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(A) A STATEMENT ADVISING THAT THE SUBSCRIPTION OR PURCHASING AGREEMENT WILL CONTINUE UNTIL THE CONSUMER CANCELS SUCH SUBSCRIPTION OR PURCHASING AGREEMENT.

(B) A WRITTEN STATEMENT ADVISING THAT THE CONSUMER MAY CANCEL THE AUTOMATIC RENEWAL OR CONTINUOUS SERVICE AT ANY TIME BEFORE IT BECOMES EFFECTIVE.

(C) A WRITTEN STATEMENT OF THE RECURRING CHARGES THAT WILL BE BILLED TO THE CONSUMER OR CHARGED TO THE CONSUMER'S CREDIT OR DEBIT CARD AS PART OF THE AUTOMATIC RENEWAL OR CONTINUOUS SERVICE SUBSCRIPTION OR AGREEMENT AND, IF THE AMOUNT OF THE CHARGE MAY CHANGE, THEN THE FUTURE AMOUNT THAT WILL BE BILLED OR CHARGED.

(D) THE DURATION OF THE AUTOMATIC RENEWAL TERM OR A STATEMENT ADVISING THAT THE SERVICE IS CONTINUOUS.

(E) THE MINIMUM PURCHASE OBLIGATION, IF ANY.

3. (A) IT SHALL BE UNLAWFUL FOR ANY INDIVIDUAL, FIRM, COMPANY, PARTNERSHIP, LIMITED LIABILITY COMPANY, CORPORATION OR ENTITY MAKING AN AUTOMATIC RENEWAL OR CONTINUOUS SERVICE OFFER TO A CONSUMER TO DO ANY OF THE FOLLOWING:

(I) FAIL TO PRESENT THE AUTOMATIC RENEWAL OR CONTINUOUS SERVICE OFFER TERMS IN A CLEAR AND CONSPICUOUS MANNER BEFORE THE SUBSCRIPTION OR PURCHASING AGREEMENT.

(II) CHARGE THE CONSUMER'S CREDIT OR DEBIT CARD OR THE CONSUMER'S ACCOUNT WITH A THIRD PARTY FOR AN AUTOMATIC RENEWAL OR CONTINUOUS SERVICE SUBSCRIPTION OR AGREEMENT WITHOUT FIRST OBTAINING THE CONSUMER'S INFORMED EXPRESS AFFIRMATIVE CONSENT TO THE AGREEMENT CONTAINING THE AUTOMATIC RENEWAL OR CONTINUOUS SERVICE OFFER TERMS, INCLUDING THE TERM AUTHORIZING A RECURRING CHARGE AGAINST THE CONSUMER'S CREDIT OR DEBIT CARD.

(III) FAIL TO PROVIDE WITHIN TEN BUSINESS DAYS AFTER COMPLETION OF THE INITIAL ORDER, EXCEPT WHEN THE CONSUMER IS AFFORDED THE RIGHT OF RESCISSION BY THE PROVISIONS OF SECTION ONE THOUSAND SIX HUNDRED THIRTY-FIVE OF THE FEDERAL CONSUMER CREDIT PROTECTION ACT OR THE REGULATIONS THEREUNDER, A WRITTEN CONFIRMATION THAT MEMORIALIZES THE DATE THE AUTOMATIC RENEWAL OR CONTINUOUS SERVICE SUBSCRIPTION OR AGREEMENT COMMENCED AND INCLUDES THE AUTOMATIC RENEWAL OR CONTINUOUS SERVICE OFFER COST AND TERMS, CANCELLATION POLICY AND INFORMATION REGARDING HOW TO CANCEL.

(IV) IF THE AUTOMATIC RENEWAL OR CONTINUOUS SERVICE OFFER INCLUDES A FREE TRIAL, SUCH OFFER SHALL DISCLOSE WHEN AND HOW TO CANCEL AND ALLOW THE CONSUMER TO CANCEL BEFORE THE CONSUMER IS REQUIRED TO PAY FOR SUCH GOODS OR SERVICES.

(B) AN INDIVIDUAL, FIRM, COMPANY, PARTNERSHIP, LIMITED LIABILITY COMPANY, CORPORATION OR ENTITY MAKING AUTOMATIC RENEWAL OR CONTINUOUS SERVICE OFFERS SHALL PROVIDE A TOLL FREE TELEPHONE NUMBER, ELECTRONIC MAIL ADDRESS, POSTAL ADDRESS, OR ANOTHER COST-EFFECTIVE, TIMELY, AND EASY TO USE CONSUMER MECHANISM FOR CANCELLATION THAT SHALL BE DESCRIBED IN THE ACKNOWLEDGMENT SPECIFIED IN SUBPARAGRAPH (III) OF PARAGRAPH (A) OF THIS SUBDIVISION.

(C) IN THE CASE OF A CHANGE IN THE TERMS OF THE AUTOMATIC RENEWAL OR CONTINUOUS SERVICE OFFER THAT HAS BEEN ACCEPTED BY A CONSUMER, THE INDIVIDUAL, FIRM, COMPANY, PARTNERSHIP, LIMITED LIABILITY COMPANY, CORPORATION OR ENTITY SHALL PROVIDE THE CONSUMER WITH A CLEAR AND CONSPICUOUS WRITTEN NOTICE OF THE CHANGE PRIOR TO THE IMPLEMENTATION OF SUCH CHANGE AND PROVIDE THE CONSUMER AN OPPORTUNITY TO CANCEL THE SUBSCRIPTION OR AGREEMENT AND INFORMATION REGARDING HOW TO CANCEL.

4. IN ANY CASE IN WHICH AN INDIVIDUAL, FIRM, COMPANY, PARTNERSHIP, LIMITED LIABILITY COMPANY, CORPORATION OR ENTITY SENDS ANY GOODS, WARES,

MERCHANDISE OR PRODUCTS TO A CONSUMER UNDER AN AUTOMATIC RENEWAL OR CONTINUOUS SERVICE SUBSCRIPTION OR AGREEMENT WITHOUT FIRST OBTAINING THE CONSUMER'S INFORMED EXPRESS AFFIRMATIVE CONSENT AS DESCRIBED IN SUBDIVISION TWO OF THIS SECTION, THE GOODS, WARES, MERCHANDISE, OR PRODUCTS SHALL BE DEEMED AN UNCONDITIONAL GIFT TO THE CONSUMER, WITHOUT ANY OBLIGATION ON THE PART OF THE CONSUMER TO THE INDIVIDUAL, FIRM, COMPANY, PARTNERSHIP, LIMITED LIABILITY COMPANY, CORPORATION OR ENTITY, INCLUDING, BUT NOT LIMITED TO, BEARING THE COST OF OR RESPONSIBILITY FOR SHIPPING ANY GOODS, WARES, MERCHANDISE OR PRODUCTS TO THE INDIVIDUAL, FIRM, COMPANY, PARTNERSHIP, LIMITED LIABILITY COMPANY, CORPORATION OR ENTITY.

5. WHENEVER THERE SHALL BE A VIOLATION OF THIS SECTION, AN APPLICATION MAY BE MADE BY THE ATTORNEY GENERAL IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK TO A COURT OR JUSTICE HAVING JURISDICTION TO ISSUE AN INJUNCTION, AND UPON NOTICE TO THE DEFENDANT OF NOT LESS THAN FIVE DAYS, TO ENJOIN AND RESTRAIN THE CONTINUANCE OF SUCH VIOLATIONS; AND IF IT SHALL APPEAR TO THE SATISFACTION OF THE COURT OR JUSTICE THAT THE DEFENDANT HAS IN FACT VIOLATED THIS SECTION, AN INJUNCTION MAY BE ISSUED BY SUCH COURT OR JUSTICE ENJOINING AND RESTRAINING ANY FURTHER VIOLATION WITHOUT REQUIRING PROOF THAT ANY PERSON HAS IN FACT BEEN INJURED OR DAMAGED THEREBY. IN ANY SUCH PROCEEDING THE COURT MAY MAKE ALLOWANCES TO THE ATTORNEY GENERAL AS PROVIDED IN SECTION EIGHTY-THREE HUNDRED THREE OF THE CIVIL PRACTICE LAW AND RULES AND DIRECT RESTITUTION. IN CONNECTION WITH ANY SUCH PROPOSED APPLICATION, THE ATTORNEY GENERAL IS AUTHORIZED TO TAKE PROOF AND MAKE A DETERMINATION OF THE RELEVANT FACTS AND TO ISSUE SUBPOENAS IN ACCORDANCE WITH THE CIVIL PRACTICE LAW AND RULES.

6. THE FOLLOWING ARE EXEMPT FROM THE REQUIREMENTS OF THIS ARTICLE:

(A) ANY SERVICE PROVIDED BY AN INDIVIDUAL, FIRM, COMPANY, PARTNERSHIP, LIMITED LIABILITY COMPANY, CORPORATION, ENTITY OR ITS AFFILIATE WHERE EITHER THE INDIVIDUAL, FIRM, COMPANY, PARTNERSHIP, LIMITED LIABILITY COMPANY, CORPORATION, ENTITY OR ITS AFFILIATE IS DOING BUSINESS PURSUANT TO A FRANCHISE ISSUED BY A POLITICAL SUBDIVISION OF THE STATE OR A LICENSE, FRANCHISE, CERTIFICATE OR OTHER AUTHORIZATION ISSUED BY THE NEW YORK STATE PUBLIC SERVICE COMMISSION.

(B) ANY SERVICE PROVIDED BY AN INDIVIDUAL, FIRM, COMPANY, PARTNERSHIP, LIMITED LIABILITY COMPANY, CORPORATION, ENTITY OR ITS AFFILIATE WHERE EITHER THE INDIVIDUAL, FIRM, COMPANY, PARTNERSHIP, LIMITED LIABILITY COMPANY, CORPORATION, ENTITY OR ITS AFFILIATE IS REGULATED BY THE NEW YORK STATE PUBLIC SERVICE COMMISSION, THE FEDERAL COMMUNICATIONS COMMISSION, OR THE FEDERAL ENERGY REGULATORY COMMISSION.

(C) ANY INDIVIDUAL, FIRM, COMPANY, PARTNERSHIP, LIMITED LIABILITY COMPANY, CORPORATION OR ENTITY REGULATED BY THE DEPARTMENT OF INSURANCE.

S 2. Section 5-903 of the general obligations law is REPEALED.

S 3. Subdivision 11 of section 1-203 of the general obligations law is REPEALED.

S 4. This act shall take effect on the first of January next succeeding the date on which it shall have become a law.