

40--A

2015-2016 Regular Sessions

I N S E N A T E

(PREFILED)

January 7, 2015

Introduced by Sen. HOYLMAN -- read twice and ordered printed, and when printed to be committed to the Committee on Consumer Protection -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the general business law, in relation to prohibiting certain practices by businesses making an automatic renewal or continuous service offer to consumers in the state

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

1 Section 1. Legislative intent. It is the intent of the legislature to  
2 end the practice of ongoing charging of consumer credit or debit cards  
3 or third party payment accounts without the consumers' explicit consent  
4 for ongoing shipments of a product or ongoing deliveries of service.

5 S 2. The general business law is amended by adding a new article 29-BB  
6 to read as follows:

7 ARTICLE 29-BB

8 PROHIBITED SERVICE OFFER PRACTICES

9 SECTION 527. DEFINITIONS.

10 527-A. UNLAWFUL PRACTICES.

11 S 527. DEFINITIONS. FOR THE PURPOSES OF THIS ARTICLE, THE FOLLOWING  
12 DEFINITIONS SHALL APPLY:

13 1. "AUTOMATIC RENEWAL" MEANS A PLAN OR ARRANGEMENT IN WHICH A PAID  
14 SUBSCRIPTION OR PURCHASING AGREEMENT IS AUTOMATICALLY RENEWED AT THE END  
15 OF A DEFINITE TERM FOR A SUBSEQUENT TERM.

16 2. "AUTOMATIC RENEWAL OFFER TERMS" MEANS THE FOLLOWING CLEAR AND  
17 CONSPICUOUS DISCLOSURES:

18 A. THAT THE SUBSCRIPTION OR PURCHASING AGREEMENT WILL CONTINUE UNTIL  
19 THE CONSUMER CANCELS;

20 B. THE DESCRIPTION OF THE CANCELLATION POLICY THAT APPLIES TO THE  
21 OFFER;

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

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1 C. THE RECURRING CHARGES THAT WILL BE CHARGED TO THE CONSUMER'S CREDIT  
2 OR DEBIT CARD OR PAYMENT ACCOUNT WITH A THIRD PARTY AS PART OF THE AUTO-  
3 MATIC RENEWAL PLAN OR ARRANGEMENT, AND THAT THE AMOUNT OF THE CHARGE MAY  
4 CHANGE, IF THAT IS THE CASE, AND THE AMOUNT TO WHICH THE CHARGE WILL  
5 CHANGE, IF KNOWN;

6 D. THE LENGTH OF THE AUTOMATIC RENEWAL TERM OR THAT THE SERVICE IS  
7 CONTINUOUS, UNLESS THE LENGTH OF THE TERM IS CHOSEN BY THE CONSUMER; AND

8 E. THE MINIMUM PURCHASE OBLIGATION, IF ANY.

9 3. "CONSUMER" MEANS ANY INDIVIDUAL WHO SEEKS OR ACQUIRES, BY PURCHASE  
10 OR LEASE, ANY GOODS, SERVICES, MONEY, OR CREDIT FOR PERSONAL, FAMILY, OR  
11 HOUSEHOLD PURPOSES.

12 4. "CONTINUOUS SERVICE" MEANS A PLAN OR ARRANGEMENT IN WHICH A  
13 SUBSCRIPTION OR PURCHASING AGREEMENT CONTINUES UNTIL THE CONSUMER  
14 CANCELS THE SERVICE.

15 S 527-A. UNLAWFUL PRACTICES. 1. IT SHALL BE UNLAWFUL FOR ANY BUSINESS  
16 MAKING AN AUTOMATIC RENEWAL OR CONTINUOUS SERVICE OFFER TO A CONSUMER IN  
17 THIS STATE TO DO ANY OF THE FOLLOWING:

18 A. FAIL TO PRESENT THE AUTOMATIC RENEWAL OFFER TERMS OR CONTINUOUS  
19 SERVICE OFFER TERMS IN A CLEAR AND CONSPICUOUS MANNER BEFORE THE  
20 SUBSCRIPTION OR PURCHASING AGREEMENT IS FULFILLED AND IN VISUAL PROXIMI-  
21 TY, OR IN THE CASE OF AN OFFER CONVEYED BY VOICE, IN TEMPORAL PROXIMITY,  
22 TO THE REQUEST FOR CONSENT TO THE OFFER;

23 B. CHARGE THE CONSUMER'S CREDIT OR DEBIT CARD OR THE CONSUMER'S  
24 ACCOUNT WITH A THIRD PARTY FOR AN AUTOMATIC RENEWAL OR CONTINUOUS  
25 SERVICE WITHOUT FIRST OBTAINING THE CONSUMER'S AFFIRMATIVE CONSENT TO  
26 THE AGREEMENT CONTAINING THE AUTOMATIC RENEWAL OFFER TERMS OR CONTINUOUS  
27 SERVICE OFFER TERMS; OR

28 C. FAIL TO PROVIDE AN ACKNOWLEDGMENT THAT INCLUDES THE AUTOMATIC  
29 RENEWAL OR CONTINUOUS SERVICE OFFER TERMS, CANCELLATION POLICY, AND  
30 INFORMATION REGARDING HOW TO CANCEL IN A MANNER THAT IS CAPABLE OF BEING  
31 RETAINED BY THE CONSUMER. IF THE OFFER INCLUDES A FREE TRIAL, THE BUSI-  
32 NESS SHALL ALSO DISCLOSE IN THE ACKNOWLEDGMENT HOW TO CANCEL AND ALLOW  
33 THE CONSUMER TO CANCEL BEFORE THE CONSUMER PAYS FOR THE GOODS OR  
34 SERVICES.

35 2. A BUSINESS MAKING AUTOMATIC RENEWAL OR CONTINUOUS SERVICE OFFERS  
36 SHALL PROVIDE A TOLL-FREE TELEPHONE NUMBER, ELECTRONIC MAIL ADDRESS, A  
37 POSTAL ADDRESS ONLY WHEN THE SELLER DIRECTLY BILLS THE CONSUMER, OR  
38 ANOTHER COST-EFFECTIVE, TIMELY, AND EASY-TO-USE MECHANISM FOR CANCELLA-  
39 TION THAT SHALL BE DESCRIBED IN THE ACKNOWLEDGMENT SPECIFIED IN PARA-  
40 GRAPH C OF SUBDIVISION ONE OF THIS SECTION.

41 3. IN THE CASE OF A MATERIAL CHANGE IN THE TERMS OF THE AUTOMATIC  
42 RENEWAL OR CONTINUOUS SERVICE OFFER THAT HAS BEEN ACCEPTED BY A CONSUMER  
43 IN THIS STATE, THE BUSINESS SHALL PROVIDE THE CONSUMER WITH A CLEAR AND  
44 CONSPICUOUS NOTICE OF THE MATERIAL CHANGE AND PROVIDE INFORMATION  
45 REGARDING HOW TO CANCEL IN A MANNER THAT IS CAPABLE OF BEING RETAINED BY  
46 THE CONSUMER.

47 4. THE REQUIREMENTS OF THIS ARTICLE SHALL APPLY ONLY PRIOR TO THE  
48 COMPLETION OF THE INITIAL ORDER FOR THE AUTOMATIC RENEWAL OR CONTINUOUS  
49 SERVICE, EXCEPT AS FOLLOWS:

50 A. THE REQUIREMENT IN PARAGRAPH C OF SUBDIVISION ONE OF THIS SECTION  
51 MAY BE FULFILLED AFTER COMPLETION OF THE INITIAL ORDER.

52 B. THE REQUIREMENT IN SUBDIVISION THREE OF THIS SECTION SHALL BE  
53 FULFILLED PRIOR TO IMPLEMENTATION OF THE MATERIAL CHANGE.

54 5. IN ANY CASE IN WHICH A BUSINESS SENDS ANY GOODS, WARES, MERCHAN-  
55 DISE, OR PRODUCTS TO A CONSUMER, UNDER A CONTINUOUS SERVICE AGREEMENT OR  
56 AUTOMATIC RENEWAL OF A PURCHASE, WITHOUT FIRST OBTAINING THE CONSUMER'S

1 AFFIRMATIVE CONSENT, THE GOODS, WARES, MERCHANDISE, OR PRODUCTS SHALL  
2 FOR ALL PURPOSES BE DEEMED AN UNCONDITIONAL GIFT TO THE CONSUMER, WHO  
3 MAY USE OR DISPOSE OF THE SAME IN ANY MANNER HE OR SHE SEES FIT WITHOUT  
4 ANY OBLIGATION WHATSOEVER ON THE CONSUMER'S PART TO THE BUSINESS,  
5 INCLUDING, BUT NOT LIMITED TO, BEARING THE COST OF, OR RESPONSIBILITY  
6 FOR, SHIPPING ANY GOODS, WARES, MERCHANDISE, OR PRODUCTS TO THE BUSI-  
7 NESS.

8 6. WHENEVER THERE SHALL BE A VIOLATION OF THIS SECTION, AN APPLICATION  
9 MAY BE MADE BY THE ATTORNEY GENERAL IN THE NAME OF THE PEOPLE OF THE  
10 STATE OF NEW YORK TO A COURT OR JUSTICE HAVING JURISDICTION TO ISSUE AN  
11 INJUNCTION, AND UPON NOTICE TO THE DEFENDANT OF NOT LESS THAN FIVE DAYS,  
12 TO ENJOIN AND RESTRAIN THE CONTINUANCE OF SUCH VIOLATIONS; AND IF IT  
13 SHALL APPEAR TO THE SATISFACTION OF THE COURT OR JUSTICE THAT THE  
14 DEFENDANT HAS IN FACT, VIOLATED THIS SECTION, AN INJUNCTION MAY BE  
15 ISSUED BY SUCH COURT OR JUSTICE, ENJOINING AND RESTRAINING ANY FURTHER  
16 VIOLATION, WITHOUT REQUIRING PROOF THAT ANY PERSON HAS, IN FACT, BEEN  
17 INJURED OR DAMAGED THEREBY. IN ANY SUCH PROCEEDING THE COURT MAY MAKE  
18 ALLOWANCES TO THE ATTORNEY GENERAL AS PROVIDED IN SECTION EIGHTY-THREE  
19 HUNDRED THREE OF THE CIVIL PRACTICE LAW AND RULES, AND DIRECT RESTITU-  
20 TION. IN CONNECTION WITH ANY SUCH PROPOSED APPLICATION, THE ATTORNEY  
21 GENERAL IS AUTHORIZED TO TAKE PROOF AND MAKE A DETERMINATION OF THE  
22 RELEVANT FACTS AND TO ISSUE SUBPOENAS IN ACCORDANCE WITH THE CIVIL PRA-  
23 CTICE LAW AND RULES. WHENEVER THE COURT SHALL DETERMINE THAT A VIOLATION  
24 OF THIS SECTION HAS OCCURRED, THE COURT MAY IMPOSE A CIVIL PENALTY OF  
25 NOT MORE THAN ONE HUNDRED DOLLARS FOR A SINGLE VIOLATION AND NOT MORE  
26 THAN FIVE HUNDRED DOLLARS FOR MULTIPLE VIOLATIONS RESULTING FROM A  
27 SINGLE ACT OR INCIDENT. A KNOWING VIOLATION OF THIS SECTION SHALL BE  
28 PUNISHABLE BY A CIVIL PENALTY OF NOT MORE THAN FIVE HUNDRED DOLLARS FOR  
29 A SINGLE VIOLATION AND NOT MORE THAN ONE THOUSAND DOLLARS FOR MULTIPLE  
30 VIOLATIONS RESULTING FROM A SINGLE ACT OR INCIDENT. NO BUSINESS SHALL BE  
31 DEEMED TO HAVE VIOLATED THE PROVISIONS OF THIS SECTION IF SUCH BUSINESS  
32 SHOWS, BY A PREPONDERANCE OF THE EVIDENCE, THAT THE VIOLATION WAS NOT  
33 INTENTIONAL AND RESULTED FROM A BONA FIDE ERROR MADE NOTWITHSTANDING THE  
34 MAINTENANCE OF PROCEDURES REASONABLY ADOPTED TO AVOID SUCH ERROR.

35 7. THE FOLLOWING ARE EXEMPT FROM THE REQUIREMENTS OF THIS ARTICLE:  
36 A. ANY SERVICE PROVIDED BY A BUSINESS OR ITS AFFILIATE WHERE EITHER  
37 THE BUSINESS OR ITS AFFILIATE IS DOING BUSINESS PURSUANT TO A FRANCHISE  
38 ISSUED BY A POLITICAL SUBDIVISION OF THE STATE;  
39 B. ANY ENTITY REGULATED BY THE DEPARTMENT OF FINANCIAL SERVICES;  
40 C. SECURITY SYSTEM ALARM OPERATORS;  
41 D. BANKS, BANK HOLDING COMPANIES, OR THE SUBSIDIARY OR AFFILIATE OF  
42 EITHER, OR CREDIT UNIONS OR OTHER FINANCIAL INSTITUTIONS, LICENSED UNDER  
43 STATE OR FEDERAL LAW; AND  
44 E. SERVICE CONTRACT SELLERS AND SERVICE CONTRACT ADMINISTRATORS.

45 S 3. This act shall take effect on the ninetieth day after it shall  
46 have become a law.