Automatic Renewal of Membership Dues and Recurring Credit Card Payment Laws

December 21, 2015

More associations are instituting automatic membership dues renewal programs, where members’ credit cards are stored and charged periodically. While this payment structure is very appealing to many associations, certain legal issues should be carefully considered before proceeding.

Automatic payment plans have had a history of consumer complaints, including, among other things, that the charges can go unnoticed, can be very hard to reverse, and can negatively impact credit scores. As a result, automatic payments have led to government scrutiny and regulations to protect consumers from unauthorized charges to their credit cards.

There is no federal statute that directly addresses these issues, however. Rather, the issue of recurring credit card payments is primarily regulated at the state level. In an effort to protect consumers from mistakenly agreeing to automatic renewal charges, at least twenty-two states have laws on the books regulating such renewals. Some states do not regulate this area at all, but for the states that do, the statutes differ widely (although they generally apply only to individual consumer sales, rather than business-to-business sales).

Like internet privacy rules, a particular state’s laws generally apply to auto-renewal contracts entered into by any consumer residing in that particular state, regardless of where the business is located. So, the most efficient approach is to adhere to the state statute with the most rigorous requirements. California and Oregon are often viewed as having perhaps the strictest automatic-renewal statutes.

There are five basic requirements for auto-renewals:

1. Clear and conspicuous disclosure of terms;
2. Affirmative consent;
3. Terms of auto-renewal and ability to cancel;
4. Notice of material changes to terms of service; and

For the first requirement, automatic renewal terms must be presented in a clear and conspicuous manner. Some states, however, go even farther, requiring the terms to be “more conspicuous” than the surrounding text. As a result, larger or contrasting font should be used. In addition, the terms need to be present before the transaction and in immediate proximity to the consumer or member signature, or online purchase authorization button.

To meet the affirmative consent requirement, it is imperative that the association has in an “opt-in” automatic renewal with its members (for example, by clicking an “I agree” box). In other words, auto-renewal must not be made the default option, where the member is required to opt out of the auto-renewing process.

Regarding the third requirement, after the membership transaction, the association should provide the member with a written acknowledgement that includes the automatic renewal terms, cancelation policy, and information regarding how to cancel. This acknowledgement should be in a form that can be retained by the member (so, for example, in an email, or a link to a website where the terms are clearly laid out). The member should also be provided with easy-to-use cancellation mechanisms, such as a toll-free phone number or email address.

Regarding the fourth requirement, the association should provide clear and conspicuous notice of any material change to the terms of the automatic membership renewal offer, and provide information regarding how to cancel prior to implementation of the change.
Finally, for the notice of renewal requirement, members should be given adequate notice of the renewal. This should be 30-60 days before processing the auto-renewal.

Also, some states have safe harbor defenses in place, based on good faith efforts to comply, so it is important for associations to keep documentation of their compliance efforts.

Some state laws, including California, also provide that any automatically renewed product or service provided without affirmative consent is deemed an “unconditional gift,” meaning that non-compliance may result in restitution of all the renewal revenues collected. Largely because of the affirmative consent and unconditional gift provisions, California has seen a significant increase in class actions suits on this topic, including, for example, a class action suit against Spotify.

Although as stated above there is no federal statute directly regulating recurring credit card payment programs, auto-renewals have been on the radars of several attorney generals’ offices, as well as the Federal Trade Commission. For example, in 2014, the attorneys general of 45 states and the District of Columbia reached a settlement with Sirius XM Radio partially based on assertions that Sirius failed to provide adequate notice of automatically renewing subscriptions, and made it very hard for customers to cancel.

It should be noted that, besides the legal issues that are the subject of this article, associations should also consider administrative obligations that go along with adopting an auto-renewal program, such as dealing with expired credit cards and PCI compliance.

Finally, in terms of international issues, while other countries’ specific regulations on auto-renewals are beyond the scope of this article, generally, the rules of foreign countries share many similarities with those applicable to U.S. consumers and members, which basically boils down to the common sense requirements of disclosure, consent, and the ability to cancel. Without them, the practice of auto-renewal can be viewed as an unfair or deceptive trade practice, and can lead to consumer and member complaints. However, if the steps above are taken, this helps to demonstrate that the members’ interests have been taken into account, so the automatic renewal program is not likely to result in significant legal concerns.