Recurring Service Charges Act

VIRGINIA COMMISSIONERS FOR PROMOTION OF UNIFORMITY OF LEGISLATION

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What is the Recurring Service Charges Act?

- The Recurring Service Charges Act addresses recurring services charges related to certain "negative option contracts" in which a consumer is charged until proactively stopping the charges.

Helpful Definitions

- **"Recurring charge contract"** means an automatic renewal contract, continuous service contract, conversion contract or trial offer contract.
- **"Automatic renewal contract"** means a contract that renews at the end of the term for a new, specified term unless cancelled by the consumer. Also known as "evergreen contracts".
- **"Continuous Service Contract"** means a contract that imposes an ongoing charge for merchandise until the service is cancelled. In other words, "monthly bills," like phone/internet service, streaming/entertainment subscriptions, or the like.
- **"Conversion contract"** means an agreement between a consumer and seller with a definite term of more than one month that automatically converts into a continuous service contract unless the consumer cancels the continuous service contract.
- **"Trial offer contracts"** means a contract that provides for a trial period without charge (or nominal charge) that converts to a term contract or continuous service contract if the consumer fails to cancel by the end of the trial period. Also known as a free trial offer or free-to-pay conversion contract.

How can recurring charge contracts be problematic?

- Recurring charge contracts put the burden on the consumer to cancel future or ongoing consumer obligations. This "negative option" characteristic leads to consumer misunderstanding.
- Most consumer purchases involve consent to the entire purchase at the time of contract formation, along with consent to a form of payment.
- A negative option purchase scrambles this familiar sequence by separating initial consent to merchandise purchase from delayed consent to a future or ongoing purchase.

How can recurring charge contracts be problematic?

- **Automatic renewal contracts are problematic because…**
  - Misunderstanding can occur as to the future consent when consumers never understood that the contract included a negative option consent to the future purchase, or when consumers do not remember later that they need to act to avoid contract renewal.
  - Especially problematic for consumers who are less likely to comprehend how this arrangement differs from the traditional format of a purchase, including those who do not have a firm grasp of English or those with cognitive impairments.
  - Companies using this form of contract often point to consumer convenience as the rationale—i.e., consumers can continue receiving a service without the inconvenience of having to affirm their continued consent to the service or again provide a payment mechanism.

How can recurring charge contracts be problematic?

- **Continuous Service Contracts can be problematic because…**
  - These charges typically do not raise the question of consent to the later charge, but rather present issues of revocation of consent.
  - Consumer complaints about these contracts focus on the more burdensome process necessary to cancel continuing charges compared to the ease of incurring the obligation.
- **Trial Offer Contracts can be problematic because…**
  - Consumers sometimes presume that free trial means no obligation rather than a delay in charge with a contingent right to cancel if the consumer affirmatively acts to do so.
  - As stated in the Restore Online Shopping Confidence Act, free trial offers take "advantage of consumers' expectations that they would have an opportunity to accept or reject the membership club offer at the end of the trial period."

What will the Recurring Service Charges Act do?

- Notice requirement
- Extended cancellation period
- Easier for consumers to cancel

Notice Requirement

- The act requires disclosures at all stages of the recurring charge transaction appropriate to the consumer problems encountered with each type of recurring charge contract.
- The act requires a disclosure of the existence of the negative option feature prior to contract origination for all recurring charge contracts, and then again in a communication that can be easily retained by the consumer after the contract has been formed for automatic renewal and continuous service contracts.
- For automatic renewal contracts and trial offer contracts, the act requires a notice be provided to the consumer in the period immediately before the deadline for the consumer's right to avoid future obligations resulting from failure to cancel.
- The act requires a notice in the period thirty to sixty days before a renewal term automatically occurs.
- The act requires a seller using a trial offer contract to send a notice to the consumer in the period from seven days to fifteen days before the trial offer expires and converts to a term contract or continuous service contract if the consumer fails to act.

Extended cancellation period

- The act allows the consumer a sixty-day period following automatic renewal to cancel the renewal term, subject to payment for goods and services received prior to cancellation.
- An extended right to cancel is a common form of consumer protection for transaction types that have generated consumer misunderstanding, and can be found in a variety of federal and state laws from mortgage refinancing to door-to-door solicitations.
- Here, the period for cancellation is lengthy because the primary concern is that consumers are unaware they have become obligated to a contract term due to the delayed consent feature of the negative option contract.

Easier for consumers to cancel recurring charge contracts

- The act requires sellers of recurring charge contracts to provide a cancellation mechanism that is "simple, prompt and easy-to-use."
- Conversely, sellers are prohibited from obstructing or unreasonably delaying consumer cancellation.
- The cancellation mechanism also must be "readily accessible."
- For contracts entered online or where provision of the service regularly occurs online, ready accessibility requires that the seller allow cancellation online.

Excluded Contracts

- The act excludes numerous types of recurring charge contracts that are unlikely to raise consumer protection concerns or that are already regulated, including consumer contracts with regulated insurers, banks and utilities, and residential real estate contracts.

Relevant Virginia Law

- Under the Virginia Consumer Protection Act, failing to make available a conspicuous online option to cancel a recurring purchase of a good or service as required by § 59.1-207.46 of the Code of Virginia is unlawful.
- §§ 59.1-207.45 through 59.1-207.49 of the Code of Virginia governs automatic renewal offers and continuous service offers.

Relevant Virginia Law—§ 59.1-207.46

- Under § 59.1-207.46 of the Code of Virginia:
  - A supplier making an automatic renewal or continuous service offer to a consumer in the Commonwealth is prohibited from:
    - (i) failing to present the automatic renewal or continuous service offer terms in a clear and conspicuous manner,
    - (ii) charging the consumer for an automatic renewal or continuous service without first obtaining the consumer's affirmative consent, and
    - (iii) failing to provide an acknowledgment that includes the automatic renewal 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 offer includes a free trial, the supplier shall also disclose in the acknowledgment how to cancel the free trial before the consumer pays or becomes obligated to pay for the goods or services.

Relevant Virginia Law—§ 59.1-207.46

- Under § 59.1-207.46 of the Code of Virginia:
  - A supplier making automatic renewal or continuous service offers shall provide a toll-free telephone number, an electronic mail address, a postal address only when the supplier directly bills the consumer, or another cost-effective, timely, and easy-to-use mechanism for cancellation that shall be described in the acknowledgment.
  - Each supplier making automatic renewal or continuous service offers through an online website shall make available a conspicuous online option to cancel a recurring purchase of a good or service.
  - In the case of a material change in the terms of the automatic renewal or continuous service offer that has been accepted by a consumer, the supplier 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 consumer.

Relevant Virginia Law—§ 59.1-207.48

- § 59.1-207.48 of the code of Virginia exempts certain services from the laws governing recurring services charges, including:
  - 1. Any service provided by a supplier or its affiliate where either the supplier or its affiliate is doing business pursuant to a franchise issued by a political subdivision of the Commonwealth or a license, franchise, certificate, or other authorization issued by the State Corporation Commission to a public service company or public utility pursuant to Title 56;
  - 2. Any service provided by a supplier or its affiliate where either the supplier or its affiliate is regulated by the State Corporation Commission, the Federal Communications Commission, or the Federal Energy Regulatory Commission;
  - 3. Alarm company operators that are regulated pursuant to § 15.2-911 of the Code of Virginia;
  - 4. A bank, bank holding company, or the subsidiary or affiliate of either, or a credit union or other financial institution, licensed under federal or state law;
  - 5. Any home protection company regulated by the State Corporation Commission pursuant to Chapter 26 (§ 38.2-2600 et seq.) of Title 38.2;
  - 6. Any home service contract provider regulated by the Department of Agriculture and Consumer Services pursuant to Chapter 33.1 (§ 59.1-434.1 et seq.); or
  - 7. Any health club registered pursuant to the Virginia Health Club Act (59.1-294 et seq.).

Changes to Virginia Code

- SB 1540 (effective July 1, 2023)
  - Amends §§ 59.1-207.45 and 59.1-207.48 of the Code of Virginia.
  - Exempts extended service contract providers, and their affiliates, regulated by the Department of Agriculture and Consumer Services and insurers or entities regulated by Title 38.2 (Insurance) from provisions of law governing automatic renewal and continuous service offers to consumers.
  - The bill also amends the definition of "automatic renewal" to mean 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 of more than one month. Current law does not specify the length of the subsequent renewal term.

Changes to Virginia Code

- HB 1517 (effective July 1, 2023)
  - Amends §§ 59.1-200 and 59.1-207.46 of the Code of Virginia
  - Requires suppliers of automatic renewals or continuous service offers that include a free trial that lasts more than 30 days to, within 30 days of the end of any such free trial, notify the consumer of his option to cancel the free trial before the end of the trial period to avoid an obligation to pay for the goods or services.
  - The bill provides that failure to notify a consumer of such option is a violation of the Virginia Consumer Protection Act.
  - The bill also makes it a violation of the Virginia Consumer Protection Act for a supplier to fail to disclose the total cost of a good or continuous service to a consumer, including any mandatory fees or charges, prior to entering into an agreement for the sale of any such good or provision of any such service.

Is the Recurring Service Charges Act a particularly good or bad idea?

- The proposed uniform act includes additional disclosure/notification requirements for consumers that are not present in Virginia code.
- The proposed uniform act could be helpful for consumers because it puts everything in one place—relevant laws in Virginia are covered in several code sections.
- Consumers would likely benefit from the proposed uniform act. On the other hand, the business community would see additional requirements, particularly notification requirements.
- There are several differences between the proposed uniform act and Virginia code (discussed on the next slide).

Differences between proposed uniform act and Virginia code

- Definition of "automatic renewal contract" and "continuous service contract"—Virginia Code says "definite term" proposed act says "definite term of more than one month"

  *Definition of "automatic renewal contract is changing July 1, 2023 to include one month.

- Definition of "continuous service contract"—proposed act includes term of more than one month, Virginia Code doesn't include term.
- Definition of "consumer" in proposed act is narrower than definition in Virginia Code.
- Virginia Code exempts certain services from the laws governing recurring services charges, some of these services are not exempt under the proposed act.
- Several options for affirmative defenses are laid out in Section 8 (page 21) of the proposed act. Option C is derived from Virginia code. The other options differ from Virginia Code.

In-put from state agencies/interest groups

- The Office of the Attorney General does not take a position on this act, but did note that there are some differences between Virginia Code and the proposed act, which have already been discussed.
- Virginia Department of Agriculture and Consumer Services (VDACS)
  - Likes the concept from a consumer protection standpoint.
  - Concerned about potential conflict--SB 1540 (effective July 1, 2023) amends § 59.1-207.48 and exempts extended service contract providers, and their affiliates, regulated by the Department of Agriculture and Consumer Services.
    - Whether this act replaces current code or acts as a supplements will impact whether or not there is a conflict.
  - Concerned that proposed act focuses on notification and is limited in the rights that are provided to consumers that go beyond notification.