



## Podcast Transcript

# Marketing a Subscription-based Service? Beware

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Lee: We used to think of subscriptions as mostly for newspapers and magazines. But today you can subscribe to get cosmetics, cars, clothes, mental health counselling, even a curated selection of cat toys and treats that will show up on your doorstep every month. Subscription based companies have become increasingly competitive as more companies are introducing subscription based models into their traditional business or launching new subscription only services.

But charging consumers on a recurring basis raises a multitude of legal concerns and monitoring changes to remain compliant with new legislation, it is essential. I am Leeann Lee and you're listening to AD-torneys@Law our podcast series devoted to all things advertising, marketing, and digital media law. Today I am talking with Linda Goldstein co-chair of BakerHostetler's advertising, marketing, and digital media team.

Linda, executing subscription programs in a legally compliant manner stymies companies large and small. So, we're glad you're here to break it down for us. Welcome to the show.

Goldstein: Thanks, it's great to be here.

Lee: So, to start our conversation what does the term subscription based marketing mean, and why has it become such a hot topic?

Goldstein: Well you know some people refer to subscription based marketing as buy until you die, but I prefer it to think of it in a much more positive way. What it is, is it's a contractual arrangement in which the consumer agrees in advance to receive and to be billed on a recurring basis for goods or services unless and until the consumer cancels and typically the consumer is automatically charged to whatever payment method they provided to the merchant when they initially signed up for the subscription.

They key benefit from subscription based marketing from a consumer standpoint is the convenience. If you're like me and you're constantly forgetting to pay your bills, it allows the consumer to continue to receive goods or services on an uninterrupted basis for as long as they like. And of course, for businesses it's a really powerful way to build and sustain a strong relationship directly with the consumer and ultimately helps increase the lifetime value of that customer. The reason it has become such a hot topic I would say is twofold.

First, even before the pandemic there has been a real surge in direct to consumer marketing. Often as a way now to gain first party data certainly since the pandemic. The desire for consumers to interact directly online with merchants has grown. And so, what has happened is subscription based marketing has really expanded, there's almost nothing you can't get today on a subscription basis, even many of the part automobile manufacturers are offering leases, car leases, on a subscription-based services. And consumers are becoming so used to buying goods and services on a subscription basis that the market has really exploded.

And the second reason again, that it has become such a hot topic is that while marketers love it and it is convenient for consumers it's also been a target of a lot of regulatory attention and we'll talk later in the show there, both at the federal and at state level it's become one of the most heavily regulated forms of marketing out there today.

Lee: Great overview. So, for companies that are currently engaged in or about to get into subscription-based marketing, what is the most important thing they need to know?

Goldstein: So really the most important thing they need to know as I just said, it's heavily, heavily regulated both at the federal and at the state level. And unfortunately, the regulations are not all aligned and so there's federal regulation. There are also now about 28 states that have some form of regulation that governs subscription-based marketing and there are differences in those statutes. And so, any marketer that wants to start a subscription-based marketing program has to at the very outset make sure they're very well informed of what those regulations are and how their particular form of subscription marketing will be impacted by those laws.

Lee: So, you've described subscription-based marketing as a heavily regulated industry. So, who exactly is doing the regulating? And what laws are companies subject to?

Goldstein: So, as I mentioned it is heavily regulated both at the federal and at the state level. At the federal level the primary enforcer is the Federal Trade Commission. And back in 2009, the FTC was given a very powerful enforcement tool. It is a statute called the Restore Online Shoppers Confidence Act or for short we call it ROSCA. And what it does is govern online transactions only, but it sets forth very specific requirements for these kinds of programs in terms of notice that has to be given to consumers about the terms and conditions of the subscription program. It requires that marketers obtain affirmative consent to the consumer to participate in that subscription and to be billed on a recurring basis and it also has cancellation requirements in particular that there be an easy method of cancellation.

And the FTC's authority to enforce that statute is very powerful because not only do they have the ability to sue and obtain injunctive relief, but this statute also carries significant statutory penalties in the event of violation. In addition to that, the states have also stepped up in a big way into this arena and we have about 28 states that have also some form of regulation or laws governing subscription based marketing and not surprisingly California and New York are the most stringent of those states, again with very specific very stringent requirements regarding notice, consent, and cancellation.

In addition to that this form of marketing has become one of the darlings of the class-action bar, so we've seen a lot of class-action litigation particularly in California because the statute there is so restricted. And in California, the District Attorneys have also formed their own task unit and they've brought a number of enforcement actions as well. So, there's really the potential to be challenged from multiple places at multiple times under lots of different laws and regulations.

Lee: Well, this certainly sounds like a legal minefield. So, can you highlight some of the key requirements that marketers need to be aware of?

Goldstein: Yes, and I would say to think of it in these three terms: notice, consent, and cancellation. And let me go into a little bit more detail about each of those. So, from a notice perspective, it's really that before a consumer signs up, and certainly before they provide their billing information, that the consumer be told all of the material terms and details of that subscription program. That means, what exactly are the products or services they're going to receive, how often will they receive them, what are they going to be charged, if there's a free trial, which many of these subscription programs have, it's critically important to tell the consumer what they're going to be charged after that free trial expires, and if it's possible that the subscription price may go up, the consumer's got to be told that at as well.

And I will mention that the FTC is particularly strict in terms of when it thinks those material terms and conditions have to be disclosed to the consumer. They believe that the disclosure has to be made before the consumer even enters their credit card information on an order form. I would also mention that California and New York not only have similar notice requirements but they actually specify type size and placement requirements for those disclosures. So they require that

those disclosures be made, not only before the consumer gives their billing information, but also in close proximity to where the consumer is going to click submit or accept or whatever button they're going to hit to submit their order. They also require that it be in at least the same type size and set apart from the surround copy in some way or larger than surrounding copy page. And you can imagine those requirements have given a lot of ammunition to the class-action plaintiffs lawyers, particularly in the state of California.

The second key requirement is consent. None of these laws actually specify exactly how the consent has to be provided but I will tell you from lots of experience with enforcement actions by the FTC, that they are of the view that there should be a checkbox or some other mechanism that clearly and unambiguously indicates that the consumer is consenting to the subscription program. And one of the big pitfalls we've seen marketers make in this regard is, particularly if there's a free trial associated program, the button might say something like start my free trial. From the FTC and the state's perspective, that's not going to cut it. They're going to view that as, hey, the consumer is just agreeing to accept a free trial. They're not agreeing to receive goods or services to be billed until they cancel. So, in terms of meeting those consent requirements you have to be very careful to make sure whatever mechanism you use unambiguously evidences that the consumer is consenting to the full terms of the offer.

And the third key prong is cancellation. Because these subscription programs basically continue indefinitely until the consumer cancels the method by which the consumer cancels and notification to the consumer about how they can cancel is extremely important and has become increasingly important in some of the recent enforcement actions. So, for example, the FTC requires that the cancellation method be as simple as the method of enrollment. States like New York and California actually require that for online transactions there has to be an online method of cancellation. And I would also point out to our listeners that because there is so much scrutiny now of the cancellation and sort of back end procedures, there has also been a lot of attention paid to say the sale programs where if a consumer does call up to cancel, a merchant tries to save that sale, some companies have been criticized for having to many save the sale programs or having the consumer in some kind of an IVR, that's like a vortex that they can't get out of. So marketers should really make sure that the method of cancellation provided is one that is simple and easy for the consumer to understand and use.

Lee: Well, with some many different laws and regulations out there, how can a marketer possible design a national campaign?

Goldstein: Well, it is definitely a challenge but it is a challenge that can and has been met, as you can tell by the prevalence of these marketing programs. And there are different approaches that we've seen our clients take. One approach is to go to the lowest common denominator. In general, if you're complying with New York and California and ROSCA, you're going to be compliant with most of the other state laws as well. In fact, most of the other state laws, I neglected to mention this earlier, are more focused on notices that have to be given to consumers

when their subscriptions are about to renew, particularly where the subscriptions are for a period of more than one month. So, while California, New York, the FTC are heavily focused on the notice, the consent, and the cancellation, most of the other state laws are more focused on the notices that need to be provided particularly with longer term contracts.

Another approach is that where there are some states that are particularly restrictive, for example, I didn't mention Vermont earlier, but Vermont has a very unique but very stringent requirements for contracts that are longer than one year, which actually require a double opt in consent. Many marketers will simply decide to either not make the offer available to Vermont residents or they may decide to send Vermont residents down a different path because the requirement in that state is unique. But again, all of this underscores the importance of really being informed that the requirements in all 50 states.

Lee: Absolutely. So, if a marketer slips up and violates one of these laws, what are the potential consequences?

Goldstein: So there are a number of things that can happen depending on who comes after you. As I mentioned, if it's the Federal Trade Commission, they have been very aggressive in their enforcement of ROSCA, and typically they will require that the companies enter into a consent order. That consent order will typically contain injunctive relief. In other words, it will contain requirements that the marketer will have to follow in the future whenever they conduct these kinds of programs. And I would say that the terms of that consent order are one of the most consequences of ending up in the crosshair of the FTC. Because typically, the FTC will impose requirements in that consent order that go above and beyond what is otherwise required by law. And the biggest impact of that to any business is that it puts you in a competitive disadvantage vis-à-vis the competitors.

In addition to that, the FTC can and has required that markets who violate ROSCA give back money to consumers in the form of restitution on some or all the money they pay. The marketer as part of the subscription programs and the FTC can also extract significant penalties to the tune of over \$40,000 per violation and each offer to a consumer would be considered a separate violation. So, you can imagine how those numbers can add up. And in fact, settlements with the FTC under ROSCA have been in the multi-million dollar range.

At the state level, similarly, the state AGs can also obtain injunctive relief, statutory penalties, and require restitution. And in the class-action arena, what we've typically seen is that the class-action plaintiff's lawyers will also require that there be some kind of conduct remediation in the form of injunctive relief, as well as payments back to consumers, and, of course, a significant payment to the plaintiff's lawyers for the work that they've done on the case. So, generally what you're looking at if you run afoul of these laws is, you're looking at some kind of restriction on how you can conduct these programs in the future and likely a substantial monetary payment.

Lee: Okay. Now let's shift gears and talk about trends. Have there been any recent trends or developments that marketers should be aware of?

Goldstein: So, yes, there have. Given the time that we have left, I'll just highlight a few. Certainly the focus of the class-action plaintiffs are on subscription based marketers has been a significant trend and over the course of the last five years they've gone after some of the major companies and brands that engage in subscription-based marketing. I think one of the most interesting trends we're seeing now is coming from the FTC and it has to do with what the FTC is calling dark patterns. And what the FTC means by dark patterns are ways in which the consumer journey on a website is structured to sort of navigate the consumer from the start of the offer ultimately to a purchase. And particularly in cases involving subscription-based marketing, the FTC has begun to take a very careful look at consumer how the consumer is navigating through the website and whether any techniques are being used that the FTC believes are manipulating the consumer into signing up for a subscription without being aware of all the terms and conditions. And in fact, the FTC is going to have workshop specifically on this topic of dark web patterns. And it is really particularly relevant to this marketing. So it's something we're going to want to pay close attention to and it will be interesting to see what kind of research the FTC brings during that hearing.

Lee: Well, as we come to the end of our chat, what are some of the most important best practices you would recommend to marketers to keep them out of the legal crosshairs?

Goldstein: Sure, so, I think there are a few. The first has to do with the disclosure of the material terms and conditions of the offer. I always tell my clients, imagine that it's your grandmother that's looking at this offer, or grandfather, do you believe he or she navigating through the offer would really understand all the terms and conditions of the offer, particularly the fact that they're going to continue to be charged on a recurring basis until they cancel. Secondly, as I mentioned, is to really pay attention to your consent mechanism. Make sure that that consent is clear and unambiguous and try to have your disclosure of the material terms and conditions as close as possible to that consent mechanism. So that in the mind of the consumer there's a connection between the two. You should also ensure that you have a simple method of cancellation. And equally important, really take a look at your back end procedures and also monitor your complaints. I think it's important for any marketers that are offering subscription programs to take a look at they save a sale practices, to take a look at the complaints as they might relate to cancellation, are consumers complaining about having difficulty cancelling. Often your own internal complaints can be the best barometer of whether you may have a regulatory action brewing. And then finally, it's just critically important to stay informed of the state laws. There are new ones that are being passed all the time and that really can create and unintended legal minefield for well-intentioned marketers. So stay abreast of those state laws and continue to be vigilant about understanding and implementing them.

Lee: Well Linda, I know our listeners learned a great deal today. Thank you so much for being here.

Goldstein: Thank you for having me.

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