

**TO:** ULC Study Committee on Recurring Charges  
**FROM:** Prentiss Cox, Reporter  
**DATE:** March 7, 2022  
**RE:** Next Steps

This Memorandum summarizes the following prior to our March 10, 2022 meeting: (1) the state of the law in this area, (2) identification of issues that this Study Committee has decided and needs to determine; and (3) a recommendation to vote on establishing a Drafting Committee.

## 1. State of the Law.

The Initial Reporter's Memo that provided an analysis of the law in this area is dated April 15, 2021. The memo identified the following state laws addressing four types of market concerns that might be of concern to the committee: (a) automatic renewal, (b) free trial offers, (c) preacquired account marketing, and (d) continuous service/charges. The memo set forth the consumer protection concerns underlying each of these categories of state laws and identified existing federal and state laws in this area.

Two developments have occurred since the Initial Memo was drafted. *First*, and most importantly, the Federal Trade Commission (FTC) issued an Enforcement Statement in late October 2021 regarding negative option marketing, which it defined to include three of the above four categories of recurring charge laws. The FTC clarified its position on when marketing conduct might lead the FTC to take an enforcement action under its UDAP authority or under relevant topical laws enforced by the FTC, including the Restore Online Shoppers' Confidence Act and the Telemarketing Sales Rule. A Supplemental Reporter's Memo dated December 9, 2021, describes this FTC Enforcement Statement and possible implications for our work.

*Second*, four states have adopted new laws or amended their laws in this area. California and Illinois—two states whose laws have been used as a model for other states—amended their laws, while Colorado and Delaware enacted new laws. While none of these changes introduced new concepts into state regulation, all these laws included a requirement that cancellation of a contract (and/or continuous service) be allowed online if the sale was online—a concept gaining momentum.

## 2. Issues Determined and to be Determined

The Study Committee was presented with two issues at the outset-- first, the question of whether it made sense to proceed given indications that the FTC was going to implement rulemaking proceedings in this area; second, there was a threshold concern about whether the Committee should focus on some, or all, of the four market concerns identified in the Initial Memo. At the initial meeting of the Committee in December 2021, it is my understanding that the Committee decided to proceed in light of the FTC Enforcement Statement, which substantially lessened the likelihood that the agency would engage in rulemaking. It also is my understanding that the Committee determined to keep all four market concerns within its purview as it proceeded. Let me know if you believe either of these observations is incorrect.

The issue now before the Committee is how to proceed in determining whether to recommend that the project progress to the drafting stage. Two possible options for addressing this issue at the March 10, 2022, meeting are: (1) to decide we have enough information to recommend a drafting committee; or (2) to use the upcoming meeting to discuss the types of additional research and analysis that needs to occur before the Committee is prepared to make the determination on whether to proceed to a drafting committee. [Of course, there are many other ways to think about the options here.] The final subpart below recommends the first option; that the Committee vote on whether to proceed to the drafting stage.

### 3. Recommendation for Drafting Committee

Three reasons support moving forward now to a decision on whether to proceed to drafting. *First*, we have a substantial amount of information about the market problems and the various legislative approaches that might be taken to addressing these concerns. On automatic renewal, more states have enacted a law than have not done so—thirty states (including D.C.) already have some form of automatic renewal law. We have a record of the problems states were attempting to address with auto-renew and two model forms of legislation, as well as multiple options for variations on these models and other approaches. Fewer states have a law in the other three areas of concern, but there are multiple state laws in with different approaches for each area. Six states regulate continuous service, while a mostly different set of six states regulate free trial offers. No state has a broadly applied law dealing with preacquired marketing, although three states impose restrictions on its use in the context of free trial offers. Yet in all these areas, we have a substantial amount of public enforcement actions that establish a record of concerns, some scholarship that theorizes the problems, and federal as well as state legislation that present options for drafting.

*Second*, because so many states have already enacted laws in this area, there is some urgency to adopting a uniform law for consideration by states that do not have a law. States continue to legislate actively in this space. As Michael Jaeger notes in his excellent *Automatic Renewal State Laws* survey, “laws relating to auto-renewal programs – some in states with no current automatic renewal laws, some in states currently with only narrow laws, and some in states with comprehensive laws – are regularly introduced in state legislatures across the country.” Given the array of existing laws and the continued high level of state legislative activity on these matters, there is some urgency to create a proposed uniform approach so that states that have not yet passed legislation will have the opportunity to consider the uniform approach, which might create a critical mass to move all states toward uniformity.

*Third*, the current Committee reflects a cross-section of stakeholders on these issues. We have consumer advocates and government officials who have been involved in passing existing state legislations. On the industry side, we have observers reflecting the concerns of internet sellers, from a business sector for which these questions have been a constant concern, the fitness industry, and legal counsel for an array of sellers who rely on his expertise on these matters. And, we have a substantial number of the most well-respected legal scholars who write on these questions. We lack the involvement of the card systems companies, and that should be priority for outreach as the project continues.