HEALTH & FITNESS ASSOCIATION

April 11, 2024

The Honorable Ron Latz
Chair, Senate Commerce and Consumer Protection Committee
St. Paul, MN, 55155

Testimony Opposing SF 3920 - Automatic Renewal Related Terms Definitions and Regulation Provisions

Dear Chairman Latz,

I am writing on behalf of The Health & Fitness Association to urge you to table SF 3920, relating to automatic renewals of consumer contracts.

The Health and Fitness Association is the leading trade association dedicated to enhancing mental and physical health by creating adequate access to physical activity. From health and fitness clubs, gyms, studios, sports, and aquatic facilities to industry partners—The Health and Fitness Association works to promote and protect the Health & Fitness Industry, ensuring diverse options to keep individuals moving. In Minnesota alone, the industry comprises more than 700 facilities, allowing millions of Minnesotans to stay physically active in the way they choose.

On March 23, 2023, the Biden Administration issued a Notice of Proposed Rulemaking that would substantially address the issues contemplated by SF 3920, including the type of automatic renewal membership agreements commonly used by health clubs. In particular, the proposed regulations by the Biden Administration would require clubs to offer a simple online cancellation option for automatic renewal agreements purchased online.

At this time, The Health and Fitness Association is engaged with the Administration in response to the notice. Our goal is to help the FTC create a regulatory structure that both protects consumers and recognizes the unique operating model of brick-and-mortar health and fitness facilities. We are hopeful that the Biden Administration will ultimately issue a practical rule that applies to the industry nationwide and eliminates the need for a patchwork of state statutes.

As written, this bill includes several provisions, ambiguities, and inconsistencies that would significantly harm health and fitness industry operations in Minnesota. Given the multitude of issues that need to be addressed and the pending regulations at the federal level, we urge you to withhold action on SF 3920 at this time.

Concerns with Scope

We are primarily concerned with the implications of the proposed legislation for auto-renewal and continuous service contracts. The legislation applies to auto-renewal agreements irrespective of the term's length, as long as it's considered "definite" –additionally, it introduces the concept of an "indefinite subscription agreement."

The bill's language creates a contradictory labeling framework. It designates auto-renewal contracts as "indefinite" despite implying a definite term. Similarly, labeling continuous service contracts as "indefinite" seems redundant, given their inherent ongoing and indefinite provision. Introducing this new concept into Minnesota law seems unnecessary, especially since it doesn't align with practices in other states or established law.

While the bill acknowledges that shorter-term obligations, particularly those under 30 days, pose minimal risk to consumers, it creates confusion regarding month-to-month agreements. Exemptions are provided for “free trials” lasting 30 days or less, and notices preceding auto renewal are required within a 30-day window, suggesting that contracts with terms of 30 days or less are not the primary concern.

However, if contracts with terms under 30 days are subject to the statute, it poses logistical challenges for businesses operating on a month-to-month basis. Fitness facilities would need to send monthly notices, leading to potentially burdensome administrative tasks and costs.

As written, the proposed legislation creates antiquated, costly, unnecessary requirements, particularly on contracts with short, clearly defined terms. Such a requirement would burden businesses without corresponding benefits to consumers.

Any legislation regulating these types of agreements should provide exemptions for short-term contracts, particularly those lasting six months or less, especially if they are month-to-month agreements. This is due to the significantly reduced risk of harm compared to longer-term contracts.

Harmful Impacts on Small Businesses

The Health and Fitness Association respectfully urges the Committee to carefully consider the potential impact of the proposed bill on small businesses within the health and fitness industry.

Small businesses in this sector operate under significantly different circumstances compared to larger industry players and often have limited access to capital. According to a recent survey by Goldman Sachs, 44% of U.S. small businesses have less than three months of cash reserves. This financial vulnerability is even more pronounced among Black-owned small businesses, with 51% holding less than three months' cash reserves.

Consequently, these businesses are more susceptible to disruptions in traditional service agreements.

Furthermore, it's crucial to recognize franchisees' unique operational structure and financial status when assessing the bill's effects on health and fitness facilities. Franchise systems should not be regarded as single business entities, especially considering that over half of the nearly 800,000 franchised businesses in the U.S. are owned and operated by individuals with ten or fewer units. In the health and fitness industry, data from FRANdata shows that over 99% of the 34,254 franchised units are owned and operated by small-scale franchisees.

Many franchisees made investments based on economic models presented by the franchisors during the sales process, which often include membership program structures. In an industry already grappling with labor shortages, any disruption to operational models that fails to consider the community aspect and the relationships between small health and fitness businesses and their clientele poses significant risks to their sustainability.

Personal services, including franchised businesses in health and fitness, are expected to lead franchise expansion, with projected increases in unit numbers and revenue. However, these potential benefits to both the U.S. and Minnesota economies could be undermined by legislation failing to consider small business owners' needs adequately. It is essential for any bill to be narrowly tailored to ensure that small business owners, including the numerous franchisees within Minnesota's health and fitness industry, can maintain established practices that promote mental and physical health while engaging with their consumers.

<u>Vague and Burdensome Notice Requirements</u>
The bill includes several puzzling notice requirements that would create significant compliance issues for fitness facilities.

For example, the bill suggests that fitness facilities must send a “separate individual mailing” to members with a month-to-month contract every month. This would be a clear waste of time and resources for fitness facilities while creating more unwanted clutter for the consumer.

The bill also mandates a series of cancellation notice provisions that are unrealistic and removed from the realities of operating a small business. For instance, the bill requires fitness facilities to provide a toll-free phone option for cancellation. Very few fitness businesses have the resources to operate a 24/7 toll-free phone number or employ 24/7 staff to monitor the phone. The bill also allows for cancellation by regular mail, which bypasses the standard practice of requiring certified mail that would provide the seller and

consumer with proof of receipt for confirmation of compliance. Moreover, the legislation calls for a “clear and conspicuous” website option, which provides fitness facilities with insufficient direction for compliance.

Other examples of unworkable notice mandates found in the bill include:

- ➢ A requirement for “clear and conspicuous” notice of any material change, which fails to provide fitness facility operators with adequate guidance for compliance.
- ➢ A requirement for fitness facilities to inform consumers of future monthly pay increases, “if known,” which is impractical and business untenable. This provision would require Minnesota fitness facilities to predict implementation of future business decisions. Any business is constantly considering such decisions, but until implementation, they are just routine considerations during the course of business.
- ➢ A requirement for notices to be sent “in a timely manner”, which is open to interpretation.
- ➢ A reference to “material changes,” which neither defines nor provides instruction as to what constitutes a material change.
- ➢ A novel and unnecessary term, “indefinite subscription agreement,” which seems intended to apply to typical auto-renewal contracts. An auto-renewal contract, however, by definition, has a defined term.
- ➢ The bill requires a “clear and conspicuous” online option for termination, but the definition does not provide fitness facilities with adequate information for compliance.
- ➢ The bill requires fitness facilities to provide notices “capable of being retained.” As written, we are unclear about what this provision requires of fitness facilities.

<u>Unworkable Termination Requirements</u>

The Termination language infers that the date of cancellation will become the effective date of termination. However, cancellation is not instantaneous. Membership charges are typically processed monthly from the time of agreement and, in many cases, by a third-party service provider. In most cases, the charge made to a credit card is considered payment for using the facility and service for that particular payment/billing cycle (typically one month) such that it allows access until the billing term expires.

While the idea of “click to cancel” provides a simple mechanism for an individual to make changes to their agreement, it also poses a risk of unauthorized changes being made to an individual's agreement without their consent. In many other cases between merchants

and customers, a relationship involving changes to services involving a stored payment device or system requires two-step authentication or additional communication to ensure privacy and safety.

Unclear Enforcement

Enforcement of this bill raises concerns for our industry. It is unclear if this bill is limited to enforcement from the Attorney General's office. Ambiguity regarding a private right of action to enforce this bill regarding unfair and discriminatory business practices will result in unnecessary and frivolous lawsuits for our industry. A central regulatory authority will be essential in enforcing this statute and preventing needless legal exposure for club operators.

Thank you for the opportunity to share our deep concerns about this legislation and for considering our request to hold consideration of the legislation to allow for stakeholder input and discussion. Please know that we support laws that protect health club consumers through practical regulation, and we would welcome the opportunity to work with this committee on all related issues. Should you have any questions, please contact me at mgoscinski@healthandfitness.org.

Attached, please find our detailed comments submitted to the FTC on June 23, 2023, outlining our concerns with the proposed rule and recommendations for a business tenable solution.

Sincerely,

Mike Goscinski
Vice President for Government Affairs
The Health & Fitness Association

CC: Members of the Senate Judiciary and Public Safety Committee