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>> COVID-19 ALERT

Key Considerations for Retailers in the Face of COVID-19

THE BOTTOM LINE

>> Retailers may be rushing to adapt to the new normal and embrace an e-commerce model, but there are still a myriad of legal issues to navigate.

>> As the world of "e-tail" becomes king — at least for now — it is more important than ever to thoroughly understand the implications of new promotion mechanics and changes to consumer outreach, and to structure these changes in a manner that is compliant with the applicable laws.

Retailers are facing unprecedented challenges in the face of the COVID-19 pandemic. While some companies, such as wholesalers of essential household items and groceries, are experiencing a surge in demand, others, especially those that rely on a brick-and-mortar presence, are suffering.

Recent reports show that retail sales had plummeted in March 2020 to a degree never before seen. All retailers are forced to confront the "new normal," in particular taking steps to attempt to shift all, or substantially all, of their business online.

While the fact we live in a connected world may help these retailers stay afloat, those who are forced to quickly adapt and pivot to an e-commerce model may, in their haste, run afoul of the various regulations underpinning online promotions and consumer outreach efforts.

Below are key risk categories to keep top of mind when pivoting to an "e-tail" business.

AUTOMATIC RENEWAL PROGRAMS

With most of the nation on "lockdown", many retailers are introducing "Autoship" or "subscribe and save" programs, especially for household essentials such as toiletries, grocery deliveries and pet supplies. These "negative option" marketing practices — where the absence of affirmative consumer action constitutes consent to be charged for goods and services — are regulated by the Federal Trade Commission (FTC) through various laws, including the federal Negative Option Rule and the Restore Online Shoppers' Confidence Act (ROSCA). In addition, some states, including California, Vermont, New York and D.C., have their own recently updated legislation regarding free trials and automatic renewal programs.

These laws are intended to protect consumers from being billed on a recurring basis for products they did not intend to purchase and cannot easily cancel, and set forth express disclosure, consent, acknowledgement and cancellation requirements.

The FTC is revisiting its current regulatory framework with respect to negative option marketing (see our prior alert here) and is likely to remain focused on this issue going forward, especially given the impending proliferation of such programs in the marketplace.

GIFT CARDS & LOYALTY PROGRAMS

Many retailers are eager to quickly run promotions that encourage consumers to purchase gift cards for future use (*e.g.*, at restaurants or small business partners), or commit to

future purchases in exchange for loyalty points. It is important to remember, however, that gift cards are a hot topic on the class action litigation landscape, and are regulated not only by the Federal Credit Card Accountability Responsibility & Disclosure (CARD) Act, but also various state laws governing dormancy fees, redemptions for cash and expiration dates.

In addition, certain states have "escheat" laws providing that gift cards are presumed to be abandoned after a certain period of inactivity, and, upon such abandonment, their stored value must be transferred to the state.

Gift card programs should be carefully evaluated to determine their compliance with the applicable disclosure and tracking requirements.

CAUSE MARKETING

As the nation bands together to fight back, many retailers are introducing charitable solicitation and cause marketing elements to their programs. These models may be subject to state-by-state "commercial co-venturer" and similar charitable solicitations statutes that impose registration, bonding and disclosure requirements on the retailer or advertiser.

For example, state-by-state commercial co-venturer statutes typically apply to for-profit entities that represent that the purchase or use of goods or services offered by the commercial co-venturer will benefit, in whole or in part, a charitable organization. As an example, a statement such as "X percent of a consumer's purchase of [product] will benefit [charity]" would subject the retailer to these laws.

In addition, retailers will need permission from the charity to use the charity's name or logo.

SWEEPSTAKES

Furthering the notion of wanting to benefit worthy causes, many retailers are beginning to offer free items to healthcare workers, teachers and other professionals on the front lines of the coronavirus pandemic. While the underlying premise is noble, retailers need to be careful to not overpromise, and thus create an unintended sweepstakes where demand far outstrips supply. A recent example ending in disaster involved Reese Witherspoon's clothing brand, Draper James. The brand offered a free dress to teachers (there are over 3 million public school teachers in the U.S.), but there were only 250 dresses available.

Be sure to consider adequately disclosing limitations or caps on any offers, and don't forget the need for rules and, in certain instances, registration and bonding.

MOBILE MESSAGING

As demand for curbside "contactless" deliveries and services such as Instacart and Doordash has spiked, retailers are increasingly turning to text alerts to keep consumers up-to-date on their orders, and also communicate new offers to them. It is critical to remember that the federal government regulates telemarketing (which includes automated phone calls and texts to consumers) through the Telephone Consumer Protection Act (the TCPA) and accompanying regulations, which are enforced by the Federal Communications Commission (FCC).

The TCPA sets forth various detailed consent and disclosure requirements for transactional and commercial messages; retailers should stay on top of these laws, as telemarketing represents one of the hottest areas for consumer class action lawsuits. A failure to comply could result in damages of up to $1,500 per text message, and most class actions in this area have settled for tens of millions of dollars.

CHANGES TO PRICING AND SHIPPING MODELS

Many retailers are being forced to increase their prices and shipping minimums to account for supply chain issues and the cost of delivery. Nonetheless, state laws generally prohibit retailers or wholesalers from imposing sharp price increases on certain consumer goods after an emergency has been declared by the federal, state or local governments. Retailers should closely review any proposed pricing increases to ensure

that they are not unconscionable or constitute "price gouging" practices.

On the flip side, retailers may also be offering consumers discounts on bulk purchases. These practices are regulated by a separate patchwork of laws, as well as the FTC's Guides against Deceptive Pricing, which generally require that when a product is sold at a reduced price, the advertised "former," "original" or "regular" price to which it is compared must be an actual and bona fide price at which the product was offered to the public on a regular basis for a reasonably substantial period of time. A regular price cannot be established solely for the purpose of creating a subsequently reduced price to create the illusion that a product is on sale.

Retailers should also stay on top of the delivery promises they make to consumers, and review consumer messaging on an ongoing basis for transparency and clarity. Among other regulations, the FTC's Mail Order Rule applies to online deliveries, and requires that when a seller offers to sell merchandise, the shipment date must be clearly and conspicuously provided to the consumer or, if no shipment date is provided, the seller must have a "reasonable basis" to believe that shipment will occur within 30 days of receipt of an order. If the shipment is delayed, the seller must seek the customer's consent to such delay or provide a refund.

FOR MORE INFORMATION

Joseph Lewczak
Partner
212.468.4909
jlewczak@dglaw.com

Paavana L. Kumar
Associate
212.468.4988
pkumar@dglaw.com

or the D&G attorney with whom you have regular contact.

Davis & Gilbert LLP
212.468.4800
1740 Broadway, New York, NY 10019
www.dglaw.com

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