Proskauer

The Emerging Legal and Regulatory Risks of Loyalty Programs

Proskauer on Privacy on **May 16, 2024**

As part of our commitment to keeping you informed of new regulatory developments and their potential implications, we have highlighted recent statements by federal officials concerning loyalty programs, such as those involving airline miles and credit card points. These comments signal a potential shift in how these programs are viewed under consumer protection laws, and the plaintiffs' bar is likely to take notice.

Overview of Government Concerns

In a recent NPR interview, Department of Transportation Secretary, Buttigieg expressed concern that loyalty points and miles are not merely perks but are increasingly considered part of consumers' savings strategies. The key issue highlighted is the unilateral control companies hold over the valuation and terms of these loyalty currencies. Unlike bank deposits, the value and utility of loyalty points or miles can be altered by the issuer without the consumer's consent. This situation has drawn the attention of the government and we expect the plaintiffs' bar to follow. A transcript and audio file of the interview can be found here.

Potential Legal and Regulatory Implications

1. **Consumer Protection Laws**: The government is keen to ensure that all advertising and transactions related to loyalty programs are "fair, truthful, and transparent." Any misleading representations about the nature and value of accumulated points or miles could potentially lead to allegations of breach of federal and state consumer protection statutes.
2. **Contractual Changes**: The ability of companies to unilaterally change the terms of loyalty programs may be viewed by the plaintiffs' bar under the lens of unfair contract terms. Legal challenges could arise, particularly if changes are made retrospectively or are not communicated clearly.
3. **Privacy Concerns**: Some of the evolving U.S. state privacy laws, including California and Colorado, are already directly addressing how data gathered through loyalty programs is used and shared, a topic that has been an

enforcement priority for the California AG, and this trend is likely to continue.

4. **Antitrust Considerations**: If the control over these programs leads to anti-competitive practices, it could attract antitrust scrutiny, especially if dominant players in the market use loyalty schemes to disadvantage competitors.

Advisory Recommendations

Given these developments, we recommend the following proactive steps:

- **Review of Program Terms**: Ensure that terms and conditions governing loyalty programs are clear, fair and easily accessible to consumers. Consider legal audits to verify compliance with existing consumer protection laws.
- **Transparency in Communications**: Enhance transparency around how loyalty points are earned, redeemed and potentially devalued. Clear communication about any changes to these terms is essential to mitigate legal risks.
- **Data Privacy Compliance**: Assess and strengthen privacy policies to manage consumer data responsibly and in accordance with applicable privacy laws.
- **Antitrust Compliance**: Evaluate the competitive impacts of your loyalty program, particularly if you hold a significant market share.

We are closely monitoring these developments and are ready to assist you in conducting risk assessments and adapting your practices to meet any new regulatory requirements. For a detailed discussion on how these changes might specifically affect your operations, please contact us at your earliest convenience.

This alert is for informational purposes only and does not constitute legal advice. Please consult with your attorney for advice on specific legal issues.

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