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The Top 10 Legal Risks Impacting the Value of a Retail Brand

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Taking your retail brand to the next level and attracting an equity investment based on the value of your brand requires not only business acumen but strategies for brand protection. Protecting your trademarks by way of registration is only a first step. Brand identity and value must also be protected by complying with consumer protection, privacy and advertising laws.

These actions, while perhaps labor intensive, are the blocks needed to build trust with customers, manage legal risk and improve your chances of an equity investment that lines up with the value you have built in your brand.

Based on our experience of counselling clients in the retail industry, we have identified 10 legal risks that threaten the value of a retail brand:

1. Failure to clear and protect your trademark.

Clearance searches and strategy with expert advice: Using comprehensive search and analysis, a trademark expert can help you determine whether your trademarks can be registered or if there are risks for registration or use due to pre-existing trademarks or other issues.

Trademark registrations in the U.S. and jurisdictions where expansion in the next five years is likely: Trademark protection is jurisdictional, so knowing where your key markets are now and will be in the next five years will help to inform your filing strategy and provide opportunities to leverage international treaties to lower the costs of trademark protection.

2. Online sales practices that use dark patterns, junk fees, negative options or other practices contrary to consumer protection laws.

State and federal laws: Many states have strict consumer protection and privacy laws. Along with these state laws, the Federal Trade Commission (FTC) Act governs the activities of businesses selling goods and services online. These regulations guard against the use of dark patterns (deceptive design tactics used in an online environment that subtly manipulate the end user's decision) and the addition of fees to prices for goods or services that offer no value (also known as junk fees).

Failure to comply with the relevant legislation may result in investigations, claims and fines, all of which are likely to be made public and could damage the reputation of your brand and your customer relationships. Any such negative activity may adversely impact an equity investment in your business or the value of your enterprise for an acquisition when investors discover these issues during due diligence.

3. Loyalty and points/rewards programs, discounts and gift cards

Fair practices: Federal and state laws prohibit retailers from engaging in unfair and deceptive trade practices, such as promoting a loyalty program in a false and misleading manner, failing to disclose material terms and failing to provide rewards as promised. There are state actions and class actions concerning unfair and deceptive trade practices concerning loyalty and rewards programs alleging that consumers did not receive adequate notice of the rewards available, changes to the program or level of discounts available.

Clear Terms and Notice of Changes: Tactics such as Bait-and-Switch, where companies often promote rewards in marketing but hide complex terms in fine print; Devaluation of Rewards, where retailers devalue rewards after consumers have earned them by raising the number of points needed for redemption; Issues with Redemption, due to technical glitches and customer service issues that delay or even block the ability to redeem rewards; and Revocation of Rewards, where customers lose earned rewards when accounts close or due to expiration policies, often without notice, can all give rise to legal liability and have a negative impact on brand loyalty and value.

Expiration, Fees, Cash Back. Disclosure of Terms: An excellent tool to drive repeat purchases and to create brand loyalty is the use of gift cards and gift certificates. It is important for retailers to be aware of the different laws that apply to these programs in the locations where they operate to avoid class actions and state or federal enforcement actions. Compliance with state and federal laws on expiration, minimum term, when a consumer must be given cash back on a gift card balance, disclosure of terms and allowed fees should include clearly drafted terms, integration of requirements for cash back or fees into online retail experiences and training for customer service representatives to ensure effective communication with customers.

4. Inadequate or noncompliant signage in your stores.

Traditional or digital signage in physical stores still represents a key mode of messaging for any retail business with physical locations. Signage must comply with FTC advertising requirements and, depending on the nature of the content, may also have to comply with state laws. Diligence when choosing language on signs for discounts and exclusive offers is particularly important to the customer experience and may have a direct impact on brand value if unclear or misleading.

5. Lack of diligence in advertising, including by influencers and other endorsers.

FTC guidelines: The FTC has issued excellent guidance on advertising claims and in particular the role influencers or brand ambassadors play in advertising law compliance. Staying within the law requires vigilance in reviewing endorsements, as well as in the drafting of advertising and influencer agreements to require compliance.

Reviews and endorsements: The numerous opportunities for consumers to review and comment on your company, products and services, along with the many platforms such as Yelp and Amazon that employ consumer

reviews, can often lead brands to manufacture reviews or manage poor reviews ineffectually. Genuine reviews not only comply with the law but also can contribute positively to brand value.

Product-specific laws: Be aware of product-specific laws, such as those for cannabis, tobacco and alcohol, and state regulations that could restrict methods of advertising, access to websites by age, or require that products not be shown in association with certain activities in advertising.

For both startup and well-established businesses, social media posts, partnering with brand ambassadors and other forms of advertising require specific knowledge and consistent review. It is easy to fall afoul of laws and regulations, so incorporating legal compliance into any advertising campaign plan is essential.

6. Not having a privacy policy or not following company policies on privacy.

Although there is no federal law governing the protection of personal information (other than health information), there is a network of state laws, as well as laws in other jurisdictions, that could apply to U.S. companies.

Cybersecurity breaches and failure to have policies and adhere to them can all lead to significant legal and reputational risks. Investors and purchasers are more frequently expecting to review policies and security plans and are requiring representations and warranties with respect to privacy compliance. It will pay off in the long run to establish policies as early as possible and enforce them internally.

7. Use of third party IP without permission.

Many businesses, especially at startup, place little attention on the way they are using music, trademarks, photographs and other elements of intellectual property owned by third parties in their social media posts, advertisements and signage. Failure to properly license third-party IP can expose your business to liability, but it can also derail a potential investment or acquisition by equity investors concerned about the risk they are taking on for past infringements. Ask your legal advisor for guidance on what creative and trademark elements owned by third parties can be used without a license and, better yet, license what you want to use whenever possible.

8. Inadequate terms and conditions for sale on your website.

Every business website should have current website terms and conditions, and ecommerce sites should also have comprehensive terms governing the sale of goods or services. These terms will form the basis for your relationship with customers and are regulated primarily by state consumer protection laws. Failure to comply with state regulations may lead to claims, and more commonly, unclear terms on returns, refunds and shipping costs can lead to issues with customers resulting in reputational or customer loss.

9. Not regularly monitoring your trademark and enforcing your rights.

Ensuring your trademark is used properly internally and by licensees is essential to preserving your trademark rights and brand value. This can be accomplished through internal policies that are routinely enforced and license agreements that allow for periodic review of trademark use and quality of goods and services, and include the right to terminate for breaches.

In addition, it is important to ensure your trademark is not used without permission. There are many tools available to monitor the internet for such unauthorized use as well as the trademark registers in any country where you have trademark rights. Taking action to stop such infringement, whether by issuing cease and desist letters, opposing trademark applications or taking other legal action, will be important to preserving your trademark rights.

10. Lack of customer service.

Customer complaints, if handled well, can mitigate the risk of claims and complaints to regulators. A proactive approach to customer relations as well as a savvy social media strategy can be the difference between a brand increasing in intrinsic value or losing economic value.

Managing these risks may significantly improve your trademark value and position your company for acquisition or investment by creating a strong brand and customer relationships, as well as minimizing claims by regulators and others that could negatively impact brand value.

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