

5 Tips For Pooling Hospitality Loyalty Programs

By **Natalie Rodriguez**

Law360, New York (May 01, 2014, 8:19 PM ET) -- Hotels, casinos, travel companies and even restaurants are increasingly teaming up across industry divides to create joint rewards programs, but sloppy handling of such deals can hurt a promising partnership. From merging privacy policies to sharing intellectual property, here are five critical issues attorneys say need to be tackled before companies can enjoy the perks of pooling customers.

Be Clear About What's Getting Pooled

For companies, the allure of partnering with another business on a rewards program — which is often called a coalition loyalty program — is the opportunity to tap into an entirely new customer base.

“Each partner gets more customers and they also get the customers that are the most loyal and valuable,” said Allison Fitzpatrick, a partner in the Davis & Gilbert LLP's advertising, marketing and promotions practice group.

Additionally, companies learn much more about existing rewards holders.

“You know the customer from the hotel experience, but now you know more about the customer because you know what car they like to drive and what restaurants they like to go to.”

In an ever-competitive industry, such data is basically a gold mine that helps companies target certain advertisements and deals at certain customers.

Coalition rewards programs, however, aren't usually built from scratch, but from the foundations of each companies' legacy loyalty programs. This requires careful negotiation about just what kind of information each company is willing to hand over for the sake of the partnership, and how the newly combined system will work.

“You need to have very clear language in the program terms when you're merging two different rewards programs into a single rewards program,” Fitzpatrick said.

It's important to clearly spell out how the program currency — commonly points or miles — will be valued and if that currency ever expires. Companies should also negotiate from the beginning how to handle a future scenario where one company wants to adjust the value of their currency and how it translates to a partner's currency.

“Periodically we'll see re-evaluations of loyalty currencies. These often happen like dominoes ... in a market niche,” said Claude P. Goetz, a partner with Davis Wright Tremaine LLP's cards, payment systems and loyalty programs practice group. Often it's a response to a rival switching up their own program, which can spur other market players to follow suit to remain competitive.

One possible solution is creating a managing board, where each member company has a representative, that votes on changes that would affect the coalition program, according to Gregory Parks, a partner in Morgan Lewis & Bockius LLP's litigation practice.

Don't forget about pooling obligations, either. At the core of most of these deals is a joint marketing agreement and the parties should clearly spell out how much money and resources each will spend on promoting the loyalty program — and what kind of benchmarks each company is expected to meet.

For example, companies should determine the minimum number of website impressions they need to guarantee the success of the program to each other, said James H. Mann, a partner with Davis Wright Tremaine LLP's cards, payment systems and loyalty programs practice group.

Get On the Same Privacy Policy Page

One of the biggest issues for a joint rewards program is meshing each member's existing privacy policies.

“We have to look at what the privacy policies actually say and approach the sharing of information in a way that's consistent with those representations,” said Brian D. Fergemann, a partner in Winston & Strawn LLP's advertising, marketing and privacy group.

That can prove particularly tricky, however, if one company has promised to keep a tight hold on customer information.

“In some cases, there are very broad ... representations that [a company] will never share information with a third party,” Fergemann noted. If that's the case, its going to mean getting consent from existing customers before they can be added to the new loyalty program pool.

Privacy policies and disclosures are something that regulators are watching, experts note. The Consumer Financial Protection Bureau, for one, recently raised concerns about the lack of transparency in credit card loyalty program disclosures, Mann noted. And there are consumer protection laws to keep in mind.

Once companies have agreed to share information and currencies, it's important each coalition member presents uniform terms and conditions.

“It would be very bad if there were any variations in what the contract said member to member,” Mann said, noting that discrepancies could fall under unfair deceptive practices laws.

Have a Plan for Guarding Data

On top of having clear privacy policies in place, companies should also be clear with each other about how customer data will be protected, according to Fergemann.

There should be clear representations in the initial contract as to how each company plans to safeguard customer information and as to how liability may be meted out between the companies in various situations, experts noted. Typically, the company that serves as primary host for the program's data and has ownership of the digital infrastructure often bears the greatest share of liability, but companies can sometimes agree to share responsibility, according to Parks.

Companies should also have a joint data breach plan in place for the worst case scenario: a massive hack into customer information. This plan should lay out how coalition members will spring into action on investigating the breach and making a fix — no matter who is liable.

“That way you don't spend those precious first couple of days haggling over who's going to do what,” Parks said.

Build In an Escape Hatch

Every company goes into these partnerships hoping for the best, but sometimes the joint deals just don't turn out to be as successful or as beneficial as first envisioned.

“One of the biggest challenges is recognizing the possibility that one company might ultimately want to end the program,” Parks said.

With promises being made to each other's customers on how points or miles might be exchanged, or what kinds of perks come with signing up for the program, this can be a particularly sticky situation.

“In most cases you're not going to have the ability to immediately terminate without cause. With a lot of these programs, these companies are making rather substantial investments,” Fergemann said.

Attorneys, however, should negotiate from the beginning on a provision that give clients a clear out if a scandal erupts with one company or if one or more members aren't holding up their end of the deal, per stipulated benchmarks, according to experts.

“You have to take into consideration that you're dealing with a third party that may run into issues with their program or services,” Fergemann said.

Set the Stage for Shared IP

Going into a coalition deal will sometimes require the founding partners to build new technological infrastructure and creative materials to promote and handle the program, while other times this can be sourced out to a separate management company, experts note. Either way, there should be a blueprint laid out in the initial deal for how the parties will treat the intellectual property and various trademarks that are a part of the joint loyalty program.

Often, if one party funds the development of certain intellectual property, that company will hold the rights and license them out to other members. Other times, however, the intellectual property or trademarks might be shared. It can become particularly complicated during the lifetime of the partnership, however, if one company tweaks or builds on an idea, technology or creative material that another company originally spearheaded.

“It's a rabbit hole,” Goetz said, adding that it's important to have clear plans on how such intellectual

property or trademarks will be treated, whether there's exclusivity and what happens to the materials if anyone leaves the coalition.

Due to the tradeoff between fostering innovation and having to deal with messy IP battles, some coalitions may take a position to limit innovation.

“The only best practice is really to make sure that your client has thought about it and that you're making the client aware of their legal options,” Goetz said.

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