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Cause Marketing: How To Avoid The State Treasurer's Coffers From Becoming The Beneficiary Of Your Charitable Promotion

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Marketers have historically recognized the benefits of connecting a for-profit company's image or sales to a charitable cause, and in recent years marketers have taken their efforts to a new level with a boom in campaigns that use sales of a particular product to benefit a charitable cause. For example, Motorola, Converse, GAP, Apple and other consumer product giants helped launch the (RED) Campaign to support The Global Fund to Fight AIDS, Tuberculosis and Malaria. Similarly, Nike kicked off the yellow LiveSTRONG wristband rage by selling the wristbands on its website and through retailers, advertising that the $1 sale price would go to the Lance Armstrong Foundation. In October 2006, Campbell's Soup changed its iconic can label on chicken noodle and tomato soups sold in The Kroger Company's stores – Campbell's changed the label from red and white to pink and white and added a pink ribbon in support of the Susan G. Komen Breast Cancer Foundation. Kroger doubled its order of chicken noodle and tomato soups for that month, and Campbell's agreed to donate $250,000 to the Susan G. Komen Foundation.

Consumers are responding to these marketing strategies. According to a nationwide survey conducted by the brand-strategy firm Cone, Inc., when shopping during the holidays in 2006, more than half of Americans (57 percent) intended to purchase a gift that involved a donation of a portion of the proceeds to a cause. Almost six out of ten shoppers (59 percent) planned to support a charity by purchasing gifts from retailers that support a philanthropic cause. That number was up seven percent from 2005.

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Although cause marketing can have significant benefits, it may also trigger legal requirements – such campaigns often fall within the scope of numerous state statutes governing "commercial co-venturers." The definition of "commercial co-venturer" varies from state-to-state, but it is typically defined as a for-profit company that advertises that sales of a product or service will benefit a charitable cause. These statutes can impose a variety of contractual, registration, advertising disclosure, and record-keeping requirements that companies must consider before launching any campaign.[1]

Contractual Provisions

The commercial co-venturer should have a contract with the charitable organization to define the terms of the relationship and the responsibilities of each party. Several states require the parties to have a written contract. In addition, a few states require specific provisions and further mandate that the commercial co-venturer submit a copy of the contract to the state. For example, the contract should include the following provisions:

- Statement of the name, address, and telephone number of the for-profit company and charitable organization;
- Statement of the charitable purposes for which the campaign is being conducted;
- Geographic area where the promotion will be offered;
- Dates that the campaign will begin and end;
- Statement of any guaranteed minimum and/or maximum percentage of gross receipts to be remitted to the charity, excluding any amount that the charity must pay for fundraising costs, if any;
- Description of how the for-profit company's contribution to the charity as a result of the campaign will be calculated (e.g., a fixed dollar amount per sale);
- Description of how the for-profit company will distribute the contribution to the charity and the anticipated date(s) for such distribution;
- Representation that the charity provides express permission for the for-profit company's use of the charity's name or any other mark owned by the charity;
- Statement of the estimated number of units to be sold; and
- Requirement for the for-profit company to disclose in advertising the dollar amount or percent per unit that will benefit the charitable organization.

Washington State's registration form references some other provisions, although they are not necessarily required to complete a registration. For example, the registration form asks if the contract contains a statement that each party will have the opportunity to provide reasonable review of any marketing materials developed by the other party. The form also asks if the contract includes a statement that the charity can have reasonable access to the for-profit company's operations and financial records regarding the promotion.

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Companies launching commercial co-venture campaigns might also consider the following provisions for the contract:

• Description of the specific services, marketing materials, retailer incentives/promotions, publicity, etc. that each entity will provide;

• Representation that the charity has complied with all state charitable solicitation statutes and regulations;

• Statement of any exclusive sponsorship rights that the for-profit company might require;

• Language defining any permitted use by the charity of the for-profit company's name or other intellectual property; and

• Terms under which either party can terminate the agreement and how fees and revenues will be distributed if termination occurs.

The contract must be signed by two authorized officers, directors, or trustees of the charity and by "the person in charge" of the for-profit company's commercial co-venturer activities.

State Registrations

At least six states require commercial co-venturers to register before selling the products.[2] Although expedited registration is an option in some states, it may take 30 or more days to complete the registration process. Partial registrations that would be supplemented later are generally not permitted. Registration fees for all states total about $500. In addition, Alabama, Maine, and Massachusetts require a bond with the registration. The bonds for Alabama and Massachusetts must be for $10,000, and the Maine bond must be for $25,000.

Once a particular campaign is registered, the company must file renewals at different times, depending on the particular state.

Advertising Disclosures

To comply with the advertising disclosure requirements, each advertisement for the promotion should generally include the following in 10-point type:

• Charity's name, address, and phone number;

• For-profit company's name;

• The amount of each purchase that will benefit the charity;

• A description of the charitable purpose of the promotion;

• The percentage of each purchase that is tax deductible, if any;

• The dates of the promotion if the promotion is limited in time; and

• Any limit on the for-profit company's matching contribution.

Recordkeeping

The commercial co-venturer must also retain a copy of the contract and a financial statement reflecting the results of the campaign for three years. At the end of the promotion, the commercial co-venturer must provide an accounting statement to the charity and file it with certain states.

Enforcement

When tugging at consumers' heart strings, no company wants to become the poster child for a botched promotion. Regulators have initiated enforcement proceedings against companies acting as commercial co-venturers.

For example, nineteen states settled with McNeil Consumer Products Company and the Arthritis Foundation in 1996 in connection with the promotion of a "new" over-the-counter arthritis pain reliever. The states alleged that McNeil and the Foundation deceptively advertised that the product was more effective than comparable drugs, that a portion of each product purchase would go to help find a cure for arthritis, and that the products were "doctor recommended." Regarding the charitable contribution, the states alleged that consumers were not actually supporting the Foundation by purchasing the product because, pursuant to an agreement between McNeil and the Foundation, the Foundation would receive a guaranteed minimum $1 million annual payment from McNeil, regardless of sales. As part of the settlement, McNeil agreed to pay almost $2 million to the states in costs, to pay $250,000 to an agency of the National Institute of Health to fund scientific research relating to the diagnosis, treatment, and prevention of arthritis, and to provide refunds to consumers requesting them.

As consumers continue to respond to commercial co-ventures, the upsurge in these types of promotions will continue, and regulatory scrutiny will likely increase. Complying with the applicable state statutes and following some practical pointers can help your company avoid having the state treasury's coffers from becoming the unintended charitable cause.

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1 Charitable organizations are also subject to numerous state requirements, even if the charity is not working with a commercial co-venturer. In addition, many states govern "professional fundraisers" and "professional solicitors" and may define those terms in ways that could apply to some commercial co-venturers. Those requirements are beyond the scope of this article.

2 The laws in other states governing entities like "professional fundraisers" might also be broad enough to require registration and impose other requirements.

Practical Pointers

✓ Confirm that the charitable organization has met all applicable state requirements. For example, if the charity is not properly registered, the state statute may prohibit the commercial co-venturer from selling products that will benefit the charity.

✓ Draft the contract with the charity so it is streamlined and allows some flexibility. Marketers often want to change the products or how the products are sold once the campaign begins, and the legal team can more easily work with those changes if the contract is broad enough on those points.

✓ Allow a few weeks to complete the state registration forms. Some request detailed information or require numerous signatures that can take some time to obtain.

✓ Develop a standard set of disclosures that must appear in all advertising, and avoid any variation.

✓ Make sure that consumers can see all of the material terms on point-of-purchase materials and packaging *before* they purchase the product. For example, any limit on the amount of money that will go toward the charitable cause should not appear inside the packaging or under a sealed lid.

✓ Avoid representations that the for-profit company is soliciting from consumers or fundraising on behalf of the charitable organization.

✓ If the products are normally sold without the charitable benefit, avoid increasing the price of the product when selling it with the charitable benefit.

✓ Set up accounting and inventory tracking systems to keep running sales totals. Information can be pulled from those systems to prepare the transmittals to the charity and to prepare financial reports for states that require them.

✓ Ensure that the money promptly goes to the charity and in the promised amount. This seems like a basic point, but sometimes companies get so involved in fulfilling orders or in the buzz surrounding a promotion that the contribution to the charity does not take priority.

✓ Prepare a chart of deadlines and renewal requirements or state registrations and bonds.