



Fundraising 201: An Update on Managing the Legal Risks of Nonprofit Fundraising

October 21, 2014

Venable LLP

Washington, DC

Moderator:

Jeffrey S. Tenenbaum, Esq., Venable LLP

Panelists:

Kristalyn J. Loson, Esq., Venable LLP

Jocelyn Starzak, Esq., Special Olympics



Presentation





Fundraising 201: An Update on Managing the Legal Risks of Nonprofit Fundraising

Tuesday, October 21, 2014, 12:30 p.m. – 2:00 p.m. ET

Venable LLP, Washington, DC

Moderator

Jeffrey S. Tenenbaum, Esq., Venable LLP

Panelists

Jocelyn Starzak, Esq., Special Olympics
Kristalyn J. Lozon, Esq., Venable LLP



© 2014 Venable LLP



CAE Credit Information

***Please note that CAE credit is only available to registered participants of the live program.**

As a CAE Approved Provider educational program related to the CAE exam content outline, this program may be applied for **1.5 credits** toward your CAE application or renewal professional development requirements.

Venable LLP is a CAE Approved Provider. This program meets the requirements for fulfilling the professional development requirements to earn or maintain the Certified Association Executive credential. Every program we offer that qualifies for CAE credit will clearly identify the number of CAE credits granted for full, live participation, and we will maintain records of your participation in accordance with CAE policies. For more information about the CAE credential or Approved Provider program, please visit www.whatiscae.org.

Note: This program is not endorsed, accredited, or affiliated with ASAE or the CAE Program. Applicants may use any program that meets eligibility requirements in the specific timeframe towards the exam application or renewal. There are no specific individual courses required as part of the applications—selection of eligible education is up to the applicant based on his/her needs.

© 2014 Venable LLP



2



Upcoming Venable Nonprofit Events

[Register Now](#)

November 19, 2014 – [Enhancing the Nonprofit Governance Model: Legal Pitfalls and Best Practices](#)

December 11, 2014 – [LGBT, Religion, and Diversity in the Nonprofit Workplace](#)



Agenda

- State Regulation of Fundraising
 - Charitable Organization
 - Professional Fundraiser / Solicitor / Fundraising Consultant
 - Commercial Co-Ventures
- Tax Considerations - UBIT Issues
- Sales of Merchandise
- Fundraising Events
- Online Fundraising Platforms
- Raffles / Sweepstakes
- Mobile Giving
- Gift Acknowledgment



State Regulation of Fundraising

© 2014 Venable LLP

State Regulation of Fundraising

- A. Charity / nonprofit organization
- B. Professional solicitor
 - Professional fundraiser
 - Professional fundraising counsel / consultant
- C. Commercial co-venturer



State Regulation – Charitable Organization

- Currently 40 states require charities to register
- **Triggering definition** – Generally triggered by “solicitation” – affirmative act of asking for a gift (“contribution”) or selling goods/services that will benefit a charitable cause.
 - Broad definitions – “by any means”
 - May include grant and sponsorship solicitation
 - *E.g.*, Kentucky



State Regulation – Charitable Organization

- Typical exemptions
 - Religious organizations
 - Organizations that do not raise more than a specified amount from the public (all states) if fundraising is conducted by volunteers
 - Organizations soliciting only within membership
 - Hospitals
 - Named individual
- Some state definitions are broader than 501(c)(3) charities
 - *E.g.*, Arkansas Code Section 4-28-301: “Charitable purpose” means any benevolent, educational, philanthropic, humane, scientific, patriotic, social welfare or advocacy, public health, environmental conservation, civic, or eleemosynary objective



State Regulation – Charitable Organization

- Common requirements for charities
 - Registration and renewal
 - Unified Registration Statement
 - Disclosures when soliciting (e.g., identification of state office where financial reports are filed)
 - Annual financial reporting requirements
 - Notification of professional fundraiser, professional fundraising consultant, or commercial co-venture relationships



State Regulation – Charitable Organization

- Recent state updates
 - **Florida** – Chapter 2014-122 (July 1, 2014)
 - Requires conflict of interest policy for organizations registered to conduct solicitations
 - Requires disclosure with Department of Consumer Services contact information on all solicitations (including webpages)
 - Requires fingerprints for professional solicitors
 - **New York** – Nonprofit Revitalization Act (July 1, 2014)
 - New financial reporting thresholds
 - Designated audit committee
 - **Arizona** HB 2457 (Sep. 13, 2013) – Repealed reg.
 - **Nevada** AB 60 (Jan. 1, 2014) – Added reg.



Internet Solicitations – Charleston Principles

- Set of voluntary principles (except in Tennessee and Colorado) drafted by the National Association of State Charity Officials (NASCO)
- Register when:
 - A. Charitable organization is domiciled in state
 - B. Charitable organization is not domiciled in state, but:
 - **Offline activities** would be enough to assert jurisdiction (*e.g.*, send letter or make phone calls into state)
 - Solicits donations on Internet, and
 - Specifically targets those within that state; OR
 - Receives contributions from the state on a repeated and ongoing basis or a substantial basis through their website

Charleston Principles – Example

- **Example** - *Help A Veteran (“HAV”) is a charity that has been incorporated for three years in Virginia and also operates in the District of Columbia and Maryland. HAV wants to use a “Donate Now” button on its website to solicit donations. It will then add everyone who donates to its donor list and invite those persons to events in the District of Columbia, as well as California and New York.*

State Regulation – Professional Solicitor / Professional Fundraising Consultant

- **Professional Solicitor** – For a fee or other compensation, solicits on behalf of a charity, OR has custody and control of funds.
- **Professional Fundraising Counsel** – Manages, advises, plans, produces, or designs a solicitation. Does not directly solicit or hold funds.
- About 41 states require registration and other requirements
 - Registration
 - Bond
 - Filing of contracts
 - Disclosures

© 2014 Venable LLP

State Regulation – Professional Solicitor / Professional Fundraising Consultant

- Often **mandatory** requirements under state law for **inclusion in contracts**, such as:
 - Charity right to rescind
 - Gross collections delivered to charity
 - Donor list is intellectual property of charity
 - Listing of fee calculation
 - Signature of two charity officials
- **Commissions** – to pay or not to pay?

© 2014 Venable LLP

State Regulation – Commercial Co-Venture

- **Commercial Co-Venture (“CCV”)** – An arrangement between a charity and a commercial entity under which the commercial entity advertises in a sales or marketing campaign that the purchase or use of its goods or services will benefit a charity or charitable purpose
 - *“Every time you buy a bottle of Ethos® Water, you contribute 5 cents to the Ethos® Water Fund, part of the Starbucks Foundation.”*



15

© 2014 Venable LLP

CCV Example



16

© 2014 Venable LLP



State Regulation – Commercial Co-Venture

■ Current registration states

- Alabama (**bond** and registration)
- California (unless certain requirements are met)
- Illinois (as a charitable trust)
- Massachusetts (**bond** and Form 10B)
- South Carolina (registration and Fundraising Disclosure forms)

■ Current notification states

- Arkansas (charity)
- Connecticut (charity)
- Hawaii (CCV)
- Mississippi (CCV)
- New Hampshire (charity)
- New Jersey (charity)
- Utah (charity)



State Regulation – Commercial Co-Venture

■ Developments

- **Maine** repealed all CCV requirements in 2013
- **South Carolina** added a registration requirement in 2014
 - CCV Registration Application (CEO and CFO signatures)
 - Notice of Solicitation (registration numbers of CCV and charity)
 - Joint Financial Report with charity no more than 90 days after conclusion of the campaign



State Regulation – Commercial Co-Venture

- Mandatory contractual provisions
 - Dates of solicitation / dates of campaign
 - Amount to be donated (\$ or % of items)
 - Geographic scope
 - Schedule for donations to be transferred
 - Schedule for reporting
 - Charity ability to cancel



State Regulation – Commercial Co-Venture

- Types of required advertising disclosures
 - The name of the commercial co-venturer;
 - The name of the charity and contact information for the charity;
 - The percentage or dollar amount that will be donated per consumer action;
 - The purpose for which the donation will be used;
 - *Applicable dates of the promotion; and*
 - *Any minimum or maximum donation amount that the commercial co-venturer has pledged to donate*



State Regulation – Commercial Co-Venture

- Better Business Bureau Wise Giving Alliance, Standard 19
 - Disclose at a minimum:
 - a) Actual or anticipated portion of the purchase price that will benefit charity (\$ or %)
 - b) Duration of campaign
 - c) Any minimum or maximum contribution amount



State Regulation – Commercial Co-Venture

- New York best practices for transparent cause marketing
 - 1) Clearly describe the promotion
 - Name of charity
 - \$ per purchase
 - Caps on donations
 - Whether consumer action is required
 - 2) Allow consumers to easily determine donation amounts
 - 3) Be transparent about what is not apparent
 - Fixed amounts
 - Ribbons without donations



State Regulation – Commercial Co-Venture

- New York best practices for transparent cause marketing (continued)
 - 4) Ensure transparency in social media
 - 5) Tell the public how much was raised

DONATION INFORMATION	
Name of Charity	ABC Cancer
Donation Amount	10 cents Per Purchase
Limitations on Donation	\$500,000 Maximum Donation
Dates of Promotion	10/1/12 through 12/31/12
More Information	www.product.com



CCV Example



"Champion Warmer"

Help the next generation of Special Olympics athletes reach for the stars with Scentsy's newest Charitable Cause Warmer. Through February 28, 2013, Scentsy will donate \$8 (USD) from the sale of each *Champion Warmer* to Special Olympics International.



Tax Considerations – UBIT

© 2014 Venable LLP

Tax Considerations – UBIT

- Generally, organizations will be exempt from income received that is related to the tax-exempt mission

- BUT, subject to tax on unrelated business income
 - Trade or business
 - Regularly carried on
 - Not substantially related to organization's exempt purpose



Tax Considerations – UBIT

■ Common exceptions to UBIT

- **Qualified sponsorships** – “Payment...with no arrangement or expectation that such person will receive any substantial return benefit other than the use or acknowledgement of the name or logo” – Code 513(i)
- **Royalty income** – Passive license of intellectual property – Code 512(b)(2)
- **Sale of donated goods** – Code 513(a)(1)
- **Work performed by unpaid volunteers** – Code 513(a)(1)



Tax Considerations – UBIT

■ Take-away – Consider tax

consequences of charity’s activities

- Use of name and logo v. services / active promotion



Tax Considerations – UBIT

- Examples of UBIT concerns
 - Charity advertising
 - More than acknowledgement
 - Endorsements
 - Exclusive provider arrangements
 - Event tickets or other privileges provided by the charity to the sponsor
 - Contingency / bonus payments
 - Charity sale of goods



Sale of Merchandise

Sale of Merchandise



Be a fan[®]

Special Olympics is a global movement for people with intellectual disabilities that ties us together through the power of sport. By wearing the laces you show that you are a fan of unity.

www.specialolympics.org/wearthelaces

© 2014 Venable LLP

Sale of Merchandise

- **Hypothetical** – Your marketing department is convinced that the best way to generate new dollars for the organization is through the sale of mugs. Your organization in general tries to avoid any UBIT liability. How do you structure the mug sales campaign?



© 2014 Venable LLP



Sale of Merchandise



■ Example – Selling mugs

- **Option #1** – License to vendor
 - Royalty exception to UBIT; no promotion
- **Option #2** – Charity directly sells
 - Is it substantially related to mission?
 - Is it regularly carried on?
- **Option #3** – Given as an appreciation gift
 - Does it meet IRS requirements for insubstantial value?
 - 2% of donation or \$104, whichever is less
 - Logo item for donation of at least \$52 (adjusted for inflation) and within “low cost articles” amount (total cost does not exceed \$10.40)

© 2014 Venable LLP



Sale of Merchandise



■ Other legal considerations

- **Contracts**
 - Manufacturers
 - Distributors
 - Online distributors
 - Accounting
- **Sales tax**
- **Protection of brand**
- **Jeopardizing tax-exempt status**

© 2014 Venable LLP

Fundraising Events

© 2014 Venable LLP

Fundraising Events

- Depending on how structured, could trigger professional fundraiser or commercial co-venture concerns – or charity could be passive recipient
- **Hypothetical** – The development department at Awesome Charity wants to participate in an obstacle course run to raise funds for the organization. What are the legal implications to keep in mind?



Fundraising Events – Obstacle Run Example

- **Option 1** – Promoter puts on obstacle course run and charity is a recipient of a flat corporate donation. “Come to XYZ Obstacle Course Run. Promoter is donating \$10,000 to Awesome Charity.”
 - Charity is a passive recipient (should give written permission for use of name)
- **Option 2** – Promoter puts on an obstacle course run and advertises a portion of registration fee will benefit charity. “Come to XYZ Obstacle Course Run. 10% of your registration fee will benefit Awesome Charity.”
 - Commercial co-venture considerations
- **Option 3** – Charity puts on an obstacle course run itself and hires a promoter to assist in increasing registrations. “Come to Awesome Charity Obstacle Course Run” (invited by person paid to manage registrations and increase donations)
 - Could trigger professional fundraiser registration

© 2014 Venable LLP



Fundraising Events – Obstacle Run Example (continued)

- **Other legal considerations**
 - Health and safety concerns
 - Waivers
 - Medical
 - Crisis communications
 - Participant information / privacy concerns
 - Permits
 - Insurance
 - Reputational issues
 - Contract
 - Are contractual obligations consistent with verbal agreement?

© 2014 Venable LLP

Online Fundraising Promotions

Online Promotions – General

- As a general matter, same concepts apply online
 - If charity is soliciting online, consider **Charleston Principles**
 - If advertising online that the purchase or use of a good or service will benefit a charity, this is a **commercial co-venture promotion**
 - If charity gives consideration for a person, company, or platform to solicit or plan solicitations, could be **professional fundraiser or professional fundraising consultant**
 - Consider **UBIT** concerns

 Breast Cancer Care retweeted



Interflora Flowers @InterfloraUK · Oct 15

Support **@BCCare** this October by sending a gift that keeps on giving.
We'll donate 20% from every sale > ow.ly/CmCl3

← ↻ 6 ★ 1 ...



Online Promotions – No Purchase

- Question of whether a donation for a Facebook like or tweet, without the requirement that a consumer purchase something, qualifies as a commercial co-venture as there is no “purchase or use of a product or service.”
- Even if not technically a commercial co-venture, continue to recommend:
 - Disclosures
 - Contract between charity and for-profit



Continuous, Multi-Charity CCVs

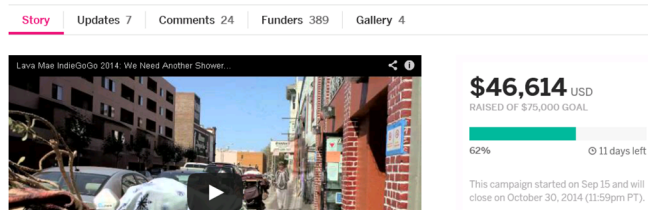
- *E.g.*, AmazonSmile
- Donations through use of AmazonSmile Foundation; commercial co-venture registered between Amazon and AmazonSmile Foundation
- Tips for participating charities
 - Register if soliciting or promoting participation
 - Consider UBIT (and participation agreement) if promoting
 - Provision of donor list



Crowd-Sourced Fundraising

- **Crowd-sourced fundraising** – Websites allow individuals to make small donations toward a common goal or initiative of an individual or organization

Lava Mae - Mobile Showers for the Homeless



© 2014 Venable LLP

Crowd-Sourced Fundraising

- Considerations for charity
 - Charitable solicitation registration
 - Terms and conditions
 - Is there a tipping point structure?
 - When will the donations be transferred?
 - Provision of charitable solicitation acknowledgment?
 - Restriction on funds received
 - Donor list
 - Provision of goods/services to donors
 - WA State Kickstarter suit

© 2014 Venable LLP

Charitable Raffles / Sweepstakes

© 2014 Venable LLP

Charitable Raffles / Sweepstakes

- Most states govern charitable raffles as an exception to the prohibition on lotteries
 - Qualified organizations and registration requirements vary on a state-by-state basis
- Some states govern sweepstakes, depending on prize value
- Federal tax issues
 - May be considered UBIT – exclusion for income and gaming events staffed by volunteers and bingo – Code sections 513(a)(1) / 513(f)
 - File Schedule G with IRS Form 990 if more than \$15,000 raised in gaming events
 - Private benefit concerns

© 2014 Venable LLP



Charitable Raffles / Sweepstakes

- New developments
 - **Florida** Charitable Gaming Promotion Prohibition
 - HB 155
 - Prohibits nonprofit entities from operating **gaming promotions**
 - Gaming promotion – “a contest, game of chance, sweepstakes, or gift enterprise, conducted by an operator within or throughout the state or other *states in connection with and incidental to the sale of consumer products or services*, and in which the elements of chance and prize are present” (emphasis added)



Charitable Promotions on Social Media

- Social networking sites – Facebook, Twitter, LinkedIn – have their own rules for promotions that apply to nonprofits
 - **Facebook:**
 - Include release of Facebook by each participant
 - Acknowledge promotion is not sponsored, endorsed, or administered by Facebook
 - Cannot use personal timeline to administer promotion
 - **Twitter:** Cannot structure a sweepstakes so it requires or encourages “retweeting”
 - **Pinterest:** Cannot run a contest in which each pin, board, like, or follow constitutes an entry
 - Cole Haan FTC Closing Letter – disclose material connection
 - **Instagram:** Don’t encourage inaccurate tagging; include release of Instagram



Mobile Giving

Mobile Giving

- Area where the technology is ahead of the law
- **Telephone Consumer Protection Act** – Prohibits using automatic dialing systems to make informational, non-telemarketing calls to wireless devices without express prior consent
 - Text messages included in “calls”
 - *Satterfield v. Simon & Schuster* – Must have prior consent from the consumer to receive messages from that specific entity (not affiliate)
 - If the call was for a commercial purpose, such as advertising a commercial co-venture, then need express prior written consent
- **New Canadian Anti-Spam Law**
 - Need prior express consent before sending electronic messages (including text messages or emails) for commercial purposes to someone in Canada

Gift Acknowledgement

© 2014 Venable LLP

Gift Acknowledgment

- **General rule** – Charitable contributions to 501(c)(3) organizations can be taken as deductions on donor's federal income taxes if (1) donative intent and (2) exceed fair market value of benefits in return
- **Requirements**
 - **Recordkeeping** – any amount
 - Donor responsibility
 - **Substantiation** – more than \$250
 - Donor responsibility
 - **Quid Pro Quo Disclosure Statement** – goods or services provided and donor contribution more than \$75
 - Charity responsibility
- For more information, see **IRS Publication 1771**

© 2014 Venable LLP

VENABLE[®] LLP



Questions?

Jeffrey S. Tenenbaum, Esq., Venable LLP

jstenenbaum@Venable.com

t 202.344.8138

Jocelyn Starzak, Esq., Special Olympics

JStarzak@SpecialOlympics.org

t 202.824.0209

Kristalyn J. Loson, Esq., Venable LLP

kjloson@Venable.com

t 202.344.4522

To view an index of Venable's articles and presentations or upcoming seminars on nonprofit legal topics, see www.Venable.com/nonprofits/publications or www.Venable.com/nonprofits/events.

To view recordings of Venable's nonprofit programs on our YouTube channel, see www.youtube.com/user/VenableNonprofits.

© 2014 Venable LLP

Speaker Biographies





Jeffrey S. Tenenbaum

Partner

Washington, DC Office

T 202.344.8138 F 202.344.8300

jstenenbaum@Venable.com

AREAS OF PRACTICE

Tax and Wealth Planning
Antitrust
Political Law
Business Transactions Tax
Tax Controversies and Litigation
Tax Policy
Tax-Exempt Organizations
Wealth Planning
Regulatory

INDUSTRIES

Nonprofit Organizations and Associations
Credit Counseling and Debt Services
Financial Services
Consumer Financial Protection Bureau Task Force

GOVERNMENT EXPERIENCE

Legislative Assistant, United States House of Representatives

BAR ADMISSIONS

District of Columbia

Jeffrey Tenenbaum chairs Venable's Nonprofit Organizations Practice Group. He is one of the nation's leading nonprofit attorneys, and also is an accomplished author, lecturer, and commentator on nonprofit legal matters. Based in the firm's Washington, DC office, Mr. Tenenbaum counsels his clients on the broad array of legal issues affecting charities, foundations, trade and professional associations, think tanks, advocacy groups, and other nonprofit organizations, and regularly represents clients before Congress, federal and state regulatory agencies, and in connection with governmental investigations, enforcement actions, litigation, and in dealing with the media. He also has served as an expert witness in several court cases on nonprofit legal issues.

Mr. Tenenbaum was the 2006 recipient of the American Bar Association's Outstanding Nonprofit Lawyer of the Year Award, and was an inaugural (2004) recipient of the *Washington Business Journal's* Top Washington Lawyers Award. He was one of only seven "Leading Lawyers" in the Not-for-Profit category in the prestigious 2012 *Legal 500* rankings, one of only eight in the 2013 rankings, and one of only nine in the 2014 rankings. Mr. Tenenbaum was recognized in 2013 as a Top Rated Lawyer in Tax Law by *The American Lawyer* and *Corporate Counsel*. He was the 2004 recipient of The Center for Association Leadership's Chairman's Award, and the 1997 recipient of the Greater Washington Society of Association Executives' Chairman's Award. Mr. Tenenbaum was listed in the 2012-15 editions of *The Best Lawyers in America* for Non-Profit/Charities Law, and was selected for inclusion in the 2014 edition of *Washington DC Super Lawyers* in the Nonprofit Organizations category. In 2011, he was named as one of Washington, DC's "Legal Elite" by *SmartCEO Magazine*. He was a 2008-09 Fellow of the Bar Association of the District of Columbia and is AV Peer-Review Rated by *Martindale-Hubbell*. Mr. Tenenbaum started his career in the nonprofit community by serving as Legal Section manager at the American Society of Association Executives, following several years working on Capitol Hill as a legislative assistant.

REPRESENTATIVE CLIENTS

AARP
Air Conditioning Contractors of America
Airlines for America
American Academy of Physician Assistants
American Alliance of Museums
American Association for the Advancement of Science
American Bar Association
American Bureau of Shipping
American Cancer Society
American College of Radiology
American Institute of Architects
American Institute of Certified Public Accountants
American Society for Microbiology

EDUCATION

J.D., Catholic University of America, Columbus School of Law, 1996

B.A., Political Science, University of Pennsylvania, 1990

MEMBERSHIPS

American Society of Association Executives

California Society of Association Executives

New York Society of Association Executives

American Society of Anesthesiologists
American Society of Association Executives
America's Health Insurance Plans
Association for Healthcare Philanthropy
Association for Talent Development
Association of Corporate Counsel
Association of Fundraising Professionals
Association of Global Automakers
Association of Private Sector Colleges and Universities
Auto Care Association
Biotechnology Industry Organization
Brookings Institution
Carbon War Room
The College Board
CompTIA
Council on Foundations
CropLife America
Cruise Lines International Association
Design-Build Institute of America
Ethics Resource Center
Foundation for the Malcolm Baldrige National Quality Award
Gerontological Society of America
Global Impact
Goodwill Industries International
Graduate Management Admission Council
Habitat for Humanity International
Homeownership Preservation Foundation
Human Rights Campaign
Independent Insurance Agents and Brokers of America
Institute of International Education
International Association of Fire Chiefs
International Sleep Products Association
Jazz at Lincoln Center
LeadingAge
Lincoln Center for the Performing Arts
Lions Club International
March of Dimes
ment'or BKB Foundation
Money Management International
National Association for the Education of Young Children
National Association of Chain Drug Stores
National Association of College and University Attorneys
National Association of Manufacturers
National Association of Music Merchants
National Athletic Trainers' Association
National Board of Medical Examiners
National Coalition for Cancer Survivorship
National Council of Architectural Registration Boards
National Defense Industrial Association
National Fallen Firefighters Foundation
National Fish and Wildlife Foundation
National Propane Gas Association
National Quality Forum
National Retail Federation
National Student Clearinghouse
The Nature Conservancy
NeighborWorks America
Peterson Institute for International Economics
Professional Liability Underwriting Society
Project Management Institute
Public Health Accreditation Board
Public Relations Society of America
Recording Industry Association of America
Romance Writers of America
Telecommunications Industry Association

Trust for Architectural Easements
The Tyra Banks TZONE Foundation
U.S. Chamber of Commerce
United Nations High Commissioner for Refugees
Volunteers of America
Water Environment Federation

HONORS

Recognized as "Leading Lawyer" in *Legal 500*, Not-For-Profit, 2012-14
Listed in *The Best Lawyers in America* for Non-Profit/Charities Law, Washington, DC (Woodward/White, Inc.), 2012-15
Selected for inclusion in *Washington DC Super Lawyers*, Nonprofit Organizations, 2014
Served as member of the selection panel for the inaugural *CEO Update* Association Leadership Awards, 2014
Recognized as a Top Rated Lawyer in Taxation Law in *The American Lawyer* and *Corporate Counsel*, 2013
Washington DC's Legal Elite, *SmartCEO Magazine*, 2011
Fellow, Bar Association of the District of Columbia, 2008-09
Recipient, American Bar Association Outstanding Nonprofit Lawyer of the Year Award, 2006
Recipient, *Washington Business Journal* Top Washington Lawyers Award, 2004
Recipient, The Center for Association Leadership Chairman's Award, 2004
Recipient, Greater Washington Society of Association Executives Chairman's Award, 1997
Legal Section Manager / Government Affairs Issues Analyst, American Society of Association Executives, 1993-95
AV® Peer-Review Rated by *Martindale-Hubbell*
Listed in *Who's Who in American Law* and *Who's Who in America*, 2005-present editions

ACTIVITIES

Mr. Tenenbaum is an active participant in the nonprofit community who currently serves on the Editorial Advisory Board of the American Society of Association Executives' *Association Law & Policy* legal journal, the Advisory Panel of Wiley/Jossey-Bass' *Nonprofit Business Advisor* newsletter, and the ASAE Public Policy Committee. He previously served as Chairman of the *AL&P* Editorial Advisory Board and has served on the ASAE Legal Section Council, the ASAE Association Management Company Accreditation Commission, the GWSAE Foundation Board of Trustees, the GWSAE Government and Public Affairs Advisory Council, the Federal City Club Foundation Board of Directors, and the Editorial Advisory Board of Aspen's *Nonprofit Tax & Financial Strategies* newsletter.

PUBLICATIONS

Mr. Tenenbaum is the author of the book, *Association Tax Compliance Guide*, now in its second edition, published by the American Society of Association Executives. He also is a contributor to numerous ASAE books, including *Professional Practices in Association Management*, *Association Law Compendium*, *The Power of Partnership*, *Essentials of the Profession Learning System*, *Generating and Managing Nondues Revenue in Associations*, and several Information Background Kits. In addition, he is a contributor to *Exposed: A Legal Field Guide for Nonprofit Executives*, published by the Nonprofit Risk Management Center. Mr. Tenenbaum is a frequent author on nonprofit legal topics, having written or co-written more than 700 articles.

SPEAKING ENGAGEMENTS

Mr. Tenenbaum is a frequent lecturer on nonprofit legal topics, having delivered over 700 speaking presentations. He served on the faculty of the ASAE Virtual Law School, and is a regular commentator on nonprofit legal issues for *NBC News*, *The New York Times*, *The Wall Street Journal*, *The Washington Post*, *Los Angeles Times*, *The Washington Times*, *The Baltimore Sun*, *ESPN.com*, *Washington Business Journal*, *Legal Times*, *Association Trends*, *CEO Update*, *Forbes Magazine*, *The Chronicle of Philanthropy*, *The NonProfit Times* and other periodicals. He also has been interviewed on nonprofit legal topics on Fox 5 television's (Washington, DC) morning news program, Voice of America Business Radio, Nonprofit Spark Radio, and The Inner Loop Radio.



Kristalyn J. Loson

Associate

Washington, DC Office

T 202.344.4522 F 202.344.8300

kjloson@Venable.com

AREAS OF PRACTICE

Regulatory
Advertising and Marketing
Tax-Exempt Organizations
Communications

INDUSTRIES

Nonprofit Organizations and Associations
Credit Counseling and Debt Services
Education

BAR ADMISSIONS

District of Columbia
Florida

EDUCATION

J.D., *with honors*, The George Washington University Law School, 2009

The Public Contract Law Journal, *member*

George Washington University Domestic Violence Project Clinic

B.A., *cum laude*, University of Miami, 2005

Department of Political Science

Kristalyn J. Loson is an Associate in Venable's Regulatory Practice Group. She focuses her practice primarily on nonprofit organizations and associations, assisting charities, trade and professional associations, and other nonprofit organizations on a wide array of legal issues, including incorporation and tax-exemption applications, tax-exemption compliance and IRS audits, corporate governance, copyrights and trademarks, membership issues, contracts, subsidiaries and affiliates, and regulatory compliance matters, among others.

Ms. Loson also has developed significant experience in the law related to charitable solicitation and commercial co-ventures. She frequently advises nonprofit organizations on state charitable solicitation registration matters, and advises numerous nonprofits each year on a wide array of challenging issues in this area. In addition, she has experience drafting agreements with professional fundraisers and assisting both for-profit and nonprofit organizations in structuring commercial co-venture campaigns. Ms. Loson also provides counsel to clients on compliance issues related to charitable gaming and contests, online charitable solicitations, and other fundraising activities.

Prior to joining Venable, Ms. Loson served as a *pro bono* staff attorney for the Guardian ad Litem Program, 20th Judicial Circuit of Florida. She also worked as a fundraiser for a large multi-national nonprofit organization before embarking on her legal career. Through her experience in the nonprofit sector, she has gained perspective on the unique needs of these organizations, both legal and otherwise.

RECENT PUBLICATIONS

- August 12, 2014, Drafting and Revising Bylaws: Common Pitfalls, Best Practices, and Maximizing the Effective Governance of Your Nonprofit
- July 1, 2014, Hotel Meeting Contracts: Navigating Legal Issues for Successful and Profitable Meetings
- June 26, 2014, Your Nonprofit's Next Big Event: Spotting and Solving the Most Common Meeting Contract Pitfalls
- January 2014, State Registration Requirements for Nonprofit Fundraising
- December 19, 2013, New York Nonprofit Revitalization Act Signed into Law
- November 21, 2013, Drafting and Revising Nonprofit Bylaws: Common Pitfalls and Best Practices
- October 16, 2013, New York Legislature Passes Nonprofit Revitalization Act: Comprehensive, Significant Changes to New York Nonprofit Corporation Law on Horizon
- October 14, 2013, The 15 Most Common Nonprofit Bylaw Pitfalls: How to Avoid the Traps

- October 9, 2013, Removing Requirements for Commercial Co-Ventures: Maine Repeals Registration Requirements for Promotions with Charitable Appeal
- July 30, 2013, New York Legislature Passes Nonprofit Revitalization Act: Comprehensive, Significant Changes to New York Nonprofit Corporation Law on Horizon
- April 25, 2013, Advertising News & Analysis - April 25, 2013, Advertising Alert
- April 18, 2013, State Regulation of Nonprofit Organizations: Everything You Need to Know about Required State Filings for Your Nonprofit Organization
- March 28, 2013, Raising Funds for Nonprofits: Key Legal Issues, Common Pitfalls & New Intellectual Property Concerns
- February 15, 2013, U.S. House of Representatives Ways and Means Committee Holds Marathon Session on Charitable Contribution Tax Deduction
- February 12, 2013, Commercial Co-Ventures – Best Practices and Legal Developments for Nonprofits

RECENT SPEAKING ENGAGEMENTS

- December 18, 2014, "Perfecting the Charitable Promotion: Legal, Financial and Practical Considerations for Commercial Co-Ventures" at the GWSCPA 2014 Nonprofit Finance and Accounting Symposium
- November 11, 2014, Legal Quick Hit: "Fundraising 201: An Update on Managing the Legal Risks of Nonprofit Fundraising" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- October 21, 2014, Fundraising 201: An Update on Managing the Legal Risks of Nonprofit Fundraising
- August 15, 2014, "Drafting and Revising Nonprofit Bylaws: Common Pitfalls and Best Practices" for the National Business Institute
- August 12, 2014, Legal Quick Hit: "Drafting and Revising Bylaws: Common Pitfalls, Best Practices, and Maximizing the Effective Governance of Your Nonprofit" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- July 1, 2014, *Association TRENDS* Webinar: "Hotel Meeting Contracts: Navigating Legal Issues for Successful and Profitable Meetings"
- June 26, 2014, Association of Corporate Counsel Webcast: "Your Nonprofit's Next Big Event: Spotting and Solving the Most Common Meeting Contract Pitfalls"
- June 6, 2014 - June 7, 2014, "Managing Meetings Gone Wrong" at the Marriott Association Masters Conference
- May 29, 2014, "Legal Q&A" at the Cause Marketing Forum
- April 29, 2014, "Contracting for Meeting Planning 101: Getting the Best Terms for Your Client" at The George Washington University School of Business
- December 10, 2013, "Briefing: Regulatory Developments Involving the TCPA and Nonprofits" for the Direct Marketing Association
- November 21, 2013, "Drafting and Revising Nonprofit Bylaws: Common Pitfalls and Best Practices" for the National Business Institute
- October 16, 2013, "New York Legislature Passes Nonprofit Revitalization Act: Comprehensive, Significant Changes to New York Nonprofit Corporation Law on Horizon" for the New York Society of Association Executives
- October 14, 2013, "Donor Intent and Contributions with Strings" for Nonprofit Spark Radio
- August 3, 2013, "Legal Duties of Regional Volunteers Officers" at the National Council of University Research Administrator's (NCURA) Regional Officer Conference
- July 24, 2013, "Raise Money, Not Risk: Legal Considerations in Fundraising" at the Special Olympics North America Conference
- June 26, 2013, "Crowdfunding 101 for Not-for-Profits: Demystifying Best Practices and Tools for Success" at a Not-for-Profit Luncheon
- May 9, 2013 - May 10, 2013, "Managing Meetings Gone Wrong: An Interactive Case

Study" for Marriott International Association Masters

- April 18, 2013, "State Regulation of Nonprofit Organizations: Everything You Need to Know about Required State Filings for Your Nonprofit Organization" for the Association Foundation Group
- March 28, 2013, "Raising Funds for Nonprofits: Key Legal Issues, Common Pitfalls & New Intellectual Property Concerns" for the Education and Research Foundation of the Better Business Bureau of Metropolitan New York
- February 12, 2013, Legal Quick Hit: "Commercial Co-Ventures: Best Practices and Legal Developments for Nonprofits" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- January 16, 2013, "Protecting Your Organization: Indemnification and Event Specific Insurance" at the PCMA Convening Leaders Conference



Jocelyn A. Starzak, Esq.

Vice President and Assistant General Counsel

Special Olympics

jstarzak@SpecialOlympics.org

202.824.0209

After having volunteering for Special Olympics for a number of years, Jocelyn Starzak joined Special Olympics International in 2009.

Ms. Starzak provides strategic counsel to Special Olympics on wide range of issues and works closely with her business counterparts in developing practical solutions to challenges facing the organization. She advises on sponsorships, charitable solicitations, and planned giving matters and related regulatory and tax compliance issues facing the organization. In addition, Ms. Starzak works closely with Special Olympics Programs to develop policies and best practices to protect the health and safety of Special Olympics athletes. With respect to marquee Special Olympics events, such as Special Olympics world and regional games, Ms. Starzak drafts contracts and counsels on issues such as contract compliance, risk management, entertainment, licensing, broadcasting and media.

Ms. Starzak received a Juris Doctor from the University of Virginia School of Law and a Bachelor of Arts in International Relations from Syracuse University.

Additional Information



AUTHORS

Jeffrey S. Tenenbaum
Stuart P. Ingis
Michael A. Signorelli

RELATED PRACTICES

Privacy and Data Security

RELATED INDUSTRIES

Nonprofit Organizations
and Associations

ARCHIVES

2014	2010	2006
2013	2009	2005
2012	2008	2004
2011	2007	

ARTICLES

June 2014

CANADA'S NEW ANTI-SPAM LEGISLATION: WHAT DOES IT MEAN FOR U.S. NONPROFITS?

Under Canada's new Anti-Spam Law (CASL), as of July 1, 2014, for-profit companies and nonprofit organizations engaged in marketing and fundraising campaigns from within Canada or to recipients in Canada must acquire prior "express consent" from recipients *before* sending commercial electronic messages (CEM). Nonprofits that send CEM to Canadian recipients must ensure that all CEM conform to the new legal requirements.

CEM

The new law covers a range of CEM sent to an "electronic address" (*i.e.*, an address used in connection with the transmission of an electronic message to an email account, an instant messaging account, a telephone account, or any similar account) that encourage participation in a commercial activity – without regard to whether profit is expected – from within Canada or to recipients in Canada. The new law states that CEM include, among other things, messages that include offers to purchase, sell, barter, or lease a product, goods, a service, land, or an interest or right in land; or offers to provide a business, investment, or gaming opportunity.

Under the new law, the term CEM includes emails, text messages, and pre-recorded voice messages, such as marketing emails regarding publications or events.

How the CASL Uniquely Affects Nonprofits

Nonprofits should keep in mind that there are very limited exemptions provided under CASL. For instance, (Canadian) "registered charities" as defined in subsection 248(1) of the Canadian *Income Tax Act* (note that there are Canadian residency requirements to qualify as a "registered charity") that send CEM with the purpose of raising funds for the charity are specifically exempt from CASL's provisions. Therefore, charities that are not Canadian "registered" should not send CEM from within Canada or to Canadian recipients without acquiring prior consent unless the message falls under another exemption, such as sending an email to someone who has paid membership dues to the sender. Nonprofits sending CEM are otherwise subject to CASL. For example, a nonprofit that sends CEM (not subject to the exemptions described below) for a purpose involving commercial activity – such as new member recruitment, soliciting sponsors, advertisers or exhibitors, promoting participation in certification and accreditation programs, or possibly even soliciting contributions – would be subject to the requirements in CASL. Nonprofits also should be careful to ensure that even electronic newsletters, magazines and similar materials sent from Canada or to Canadian recipients do not contain language promoting commercial activity.

Express Consent

Subject to limited exemptions, the new Canadian law requires consumers' express consent to send CEM. According to [guidance provided by the Canadian government](#), express consent under the new law can be either written or oral, but the onus is on the person sending the CEM to prove that consent has been provided by the recipient.

The law will require the person seeking express consent to:

- state the purpose for which consent is being sought; and
- include prescribed information that identifies the person seeking consent or the person on whose behalf consent is being sought.

According to government guidance, if consent is obtained orally, there are two permissible forms of oral consent:

- consent that can be verified by an independent third party; or
- a complete and unedited audio recording of the consent that is retained by the person seeking

consent or a client of the person seeking consent.

According to the guidance provided by the Canadian government, consent obtained in writing may be in paper or electronic form. Further, the guidance states that consent may be demonstrated by checking a box on a webpage to indicate consent where there is a record of the date, time, and purpose of consent. In addition, the manner of the consent should be stored in a database. Another example of a consent mechanism provided by the Canadian government is filling out a consent form at a point of purchase.

Under the new law, emails seeking consent to send CEM are deemed CEM. Unless the sender has acquired a recipient's prior consent or can avail itself of an exemption, a sender should not seek consent via a CEM. The guidance states that the law also prohibits certain "opt-out" or negative option approaches, such as pre-checked boxes, for securing consent.

Requirements for CEM

CEM sent from within Canada and to Canadian recipients must:

- be sent with express or implied consent from the recipient;
- clearly disclose the name of the sender or the person on whose behalf the message is sent;
- contain contact information, which must be valid for a minimum of 60 days after the message is sent, enabling the person to whom the message is sent to contact the sender or person on whose behalf the message is sent; and
- contain an unsubscribe mechanism.

Unsubscribe Mechanism

The CEM must have a means for the recipient to unsubscribe from receiving CEM from the sender, at no cost to the recipient. Further, the unsubscribe mechanism should:

- allow the recipient to unsubscribe through the same mechanism with which the CEM is sent;
- remain operable for at least 60 days after the CEM is sent; and
- honor the recipient's request to unsubscribe or withdraw within 10 business days after the unsubscribe option is exercised.

Implied Consent and Exemptions

There are several circumstances under which the law allows CEM to be **sent without the prior express consent** of the recipient:

- If a recipient has an existing business¹ or non-business relationship² with the sender, prior consent is implied until July 1, 2017, unless the recipient sends notification to the sender that he would like to unsubscribe before that date.
- If the recipient conspicuously publishes his email address, or discloses it to the sender, without stating that he does not wish to receive CEM, and the CEM is related to the individual's professional or official capacity, the CEM will have implied consent.
- If the recipient has purchased products or services from the sender, made a donation to the sender, paid membership dues to the sender, or performed volunteer work for the sender within two years of the CEM being sent, consent is implied.
- Purely transactional messages sent in response to a request, as long as those messages do not contain any advertising or promotional material, are exempt.
- Messages between organizations concerning the activities of the recipient organization, messages from telecommunication service providers, two-way voice communications, and law enforcement and public safety messages are exempt.
- Messages sent by or on behalf of registered charities (as defined in subsection 248(1) of the Income Tax Act) for the purpose of raising funds for the charity are exempt.
- Messages sent by or on behalf of a political party, political organization, or a person who is a candidate (as defined in an Act of Parliament or the legislature of a province) for publicly elected office, with the primary purpose of soliciting contributions (as defined in subsection 2(1) of the Canada Elections Act), are exempt.
- Prior consent is not required if the entity sending the CEM is referred by an individual with whom that entity has a prior business or non-business relationship, family relationship, or personal relationship. The individual providing the reference must have a relationship with the recipient, and the message must (1) disclose the full name of the individual or individuals who gave the referral, and (2) state that the message is being sent as a result of the referral.

Notably, the regulations also provide that if an entity reasonably believes that it is sending a CEM that will be accessed in a foreign state **listed in the schedule**, and that the CEM is in compliance with that

foreign state's laws for regulating CEM, that entity will not be held liable for violating CASL.

Penalties

The law authorizes the Canadian Radio-Television and Telecommunications Commission to designate a person to carry out enforcement of the new law. The law imposes penalties for violations. The maximum, per violation penalty is \$1 million Canadian dollars for individuals and \$10 million Canadian dollars for any other person (e.g., partnership, corporation, organization, association, trustee, administrator, executor, liquidator of a succession, receiver or legal representative). CASL also provides a private right of action, beginning July 1, 2017, that will allow individual plaintiffs to sue a person that they allege have been non-compliant with the law for actual losses up to \$200 Canadian dollars per violation (not to exceed \$1 million Canadian dollars for each day on which there was a violation), and other damages.

* * * * *

Given the complexities involved in making sure that your nonprofit is in compliance with CASL, as well as the penalties associated with non-compliance, it is strongly recommended that your organization evaluate and ensure compliance with the new law prior to July 1, 2014.

¹ "Existing business relationship" means a relationship arising from the purchase or lease of a product, good, or service; a business investment or gaming opportunity; a written contract in effect or having expired within 2 years of the date the CEM is sent; or an inquiry or application within a six-month period before the CEM is sent.

² "Non-business relationship" means a relationship arising from a donation or gift made by the recipient within a two-year period before the CEM is sent; volunteer work performed by the recipient within 2 years of the date the CEM is sent; or membership by the recipient in the sender's organization within 2 years of the date the CEM is sent.

AUTHORS

Jeffrey S. Tenenbaum
Kristalyn J. Loson

RELATED INDUSTRIES

Nonprofit Organizations
and Associations

ARCHIVES

2014	2010	2006
2013	2009	2005
2012	2008	2004
2011	2007	

ARTICLES

January 2014

STATE REGISTRATION REQUIREMENTS FOR NONPROFIT FUNDRAISING

This article was published in the January 2014 edition of the GuideStar newsletter.

The following discussion is provided for informational purposes only and is not intended to serve as legal advice. For advice on how state fundraising registration requirements apply to your organization, consult your attorney.

Question: Fundraising in all 50 states via (1) the Internet and (2) mailed solicitations. What do we need to know? Do we need solicitation permits in each state? What are the current laws regarding this type of fundraising?

Currently 40 states in the United States require charitable organizations to register when engaged in solicitations within the state. Charitable solicitations are broadly defined, to include almost all methods of oral, written, or online requests for contributions. The entity does not have to be physically present in a state to be soliciting (e.g., sending a letter or e-mail into the state is usually enough).

Most of the charitable solicitation statutes were written prior to the Internet age and contemplate more traditional forms of solicitation, such as calling a person in a state, holding a fundraising event, or sending a written request for a donation. With the growth of prevalence of online activities, the line of when a solicitation in a state occurred became blurred. Although adopted into law by a few states, the "Charleston Principles" serve as helpful guidelines for determining when charitable solicitations on the Internet trigger charitable registration requirements in a state.

Generally, registration is required under the Charleston Principles in a particular state in the following scenarios: (1) the charity specifically targets a person in a particular state, such as sending an e-mail to a person that the sender knew or should have known resided in a state or specifically requesting "people in X state should donate to this cause," or (2) the charity engages in passive solicitation (for example, uses a "donate now" button), but receives "substantial" or "repeated and ongoing" contributions from residents of a particular state. Therefore, if using a "donate now" button, or other passive Internet solicitation, it is generally recommended under the Charleston Principles that the organization register in states in which the organization has a physical presence—such as where the principal office is located, and then after the donate now button is active, to the extent possible, the organization assess whether a substantial number of donations are being received from certain other states.

Although the Charleston Principles provide useful guidance, we have found that practically, once an organization uses an online functionality for donation, it is likely that it will trigger registration requirements in all 40 states. This is because even if the organization receives only one donation in a state, there is almost always some form of follow-up via e-mail or letter. The follow-up action will be deemed to target a resident of that state and require registration.

Therefore, large charities often find it most efficient when increasing fundraising efforts to register in all 40 states as opposed to having to constantly re-evaluate income received from various states and the solicitations taking place in those states. In addition to law firms, there are a number of third-party companies that can perform nationwide registrations and annual renewals on a cost-efficient basis if the organization does not want to take on the registration in-house.

Of course, in addition to the specific state charitable solicitation registration requirements, states also have requirements for the charity when working with professional fundraisers or engaging in a commercial co-venture promotion. Charities also should consider federal tax laws and regulations, such as those regarding quid pro quo contribution disclosures.

* * * * *

For more information on charitable solicitations and promotions, please see the following webinar recording (and streaming PowerPoint presentation): **[How Nonprofits Can Raise Money and Awareness through Promotional Campaigns without Raising Legal Risk.](#)**

* * * * *

*For questions or more information, please contact **[Kristalyn Loson](#)** at 202.344.4522 or **kjloson@Venable.com**; or **[Jeff Tenenbaum](#)** at 202.344.8138 or **jstenenbaum@Venable.com**.*

This article is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to a specific fact situation.

AUTHORS

Kristalyn J. Loson
Melissa Landau Steinman
Jeffrey S. Tenenbaum

RELATED PRACTICES

Advertising and Marketing

RELATED INDUSTRIES

Nonprofit Organizations
and Associations

ARCHIVES

2014	2010	2006
2013	2009	2005
2012	2008	2004
2011	2007	

ARTICLES

October 9, 2013

REMOVING REQUIREMENTS FOR COMMERCIAL CO-VENTURES: MAINE REPEALS REGISTRATION REQUIREMENTS FOR PROMOTIONS WITH CHARITABLE APPEAL

Starting this week, commercial co-ventures will have one less state to worry about when it comes to regulatory requirements for conducting promotions with charities. Earlier this summer, the Maine legislature passed the [*Act to Streamline the Charitable Solicitations Act*](#) (the “Act”), which, among other things, repealed all requirements for commercial co-ventures to register in Maine. The Act is effective October 9, 2013. Prior to the Act, Maine had been one of the more onerous states for commercial co-ventures, requiring that the commercial co-venture register with the state and obtain a \$25,000 bond before conducting a promotion.

A commercial co-venturer was previously defined in Maine as one who “conducts a sale, performance, event, or collection and sale of donated goods that is advertised in conjunction with the name of a charitable organization.” The most common form of a commercial co-venture is a promotion that advertises when a consumer buys a product, a dollar or percentage amount of the purchase price will be donated to a charity. These types of promotions are particularly popular in October, when many products turn pink for breast cancer awareness month.

The Maine Department of Professional and Financial Regulation, which helped to develop the Act, explained in testimony that Maine had never received a complaint about commercial co-ventures.

Maine Requirements Not Affected by Repeal

Importantly, passage of the Act does not repeal the annual registration responsibilities for charities in Maine; it simply lifts the requirement that specific promotions be registered. Maine, like 38 other states, requires charities to register prior to soliciting charitable contributions in the state. Therefore, companies that wish to partner with charities to advertise a promotion in Maine should continue to ensure the charity itself is registered in Maine, as well as in other states where it is required. Also, although it is no longer legally required in Maine, it is generally a best practice for companies conducting charitable promotions to have a written agreement with the charity, so that all parties understand the terms of the promotion; this agreement will be required to be filed in certain other states. Charitable promotions in Maine continue to be subject to the Maine Unfair Trade Practices Act, which generally prohibits unfair or deceptive advertising.

Commercial Co-Venture Requirements in Other States

Regardless of developments in Maine, other states with commercial co-venture registration and bonding requirements – Alabama, Massachusetts, Illinois, and, in some cases, California – continue to maintain their statutory commercial co-venture requirements. Eight other states require that an agreement between the charity and the commercial co-venture be filed with the state, and many states have statutory requirements for provisions the agreement must contain. Additionally, numerous states require that specific disclosures be made in each advertisement for the commercial co-venture promotion, such as the dollar amount or percentage per good or service that will benefit the charity and the name and address of the charity. Therefore, although conducting promotions in Maine will become easier, commercial co-ventures will still have plenty of other state requirements to consider for nationwide promotions.

Many companies will welcome Maine’s repeal of its commercial co-venture requirements, as these requirements can impose a significant administrative burden on companies wishing to promote a charitable purpose as part of an advertising campaign. In [*testimony in support of the Maine Act*](#), Anne Head, director of Maine’s Department of Professional and Financial Regulation, explained that Maine’s former requirements for commercial co-ventures were unnecessary because, “[t]he agreement between the charitable organization and the sponsor is a matter of contract law” and “any dispute

arising between a charitable organization and a sponsor concerning the remittance of contributions, or the amount of contributions collected, can be resolved by those parties or by the courts as a matter of contract law.” It will remain to be seen whether other states follow Maine’s approach in easing administrative requirements for companies seeking to conduct charitable promotions and commercial co-ventures.

* * * * *

For questions or more information, please contact **Kristalyn Loson** at 202.344.4522 or ; **Melissa Landau Steinman** at 202.344.4972 or ; or **Jeff Tenenbaum** at 202.344.8138 or .

This article is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to a specific fact situation.

AUTHORS

Jonathan L. Pompan
Kristalyn J. Loson

RELATED PRACTICES

Tax-Exempt Organizations

RELATED INDUSTRIES

Nonprofit Organizations
and Associations

ARCHIVES

2014	2010	2006
2013	2009	2005
2012	2008	2004
2011	2007	

ARTICLES

October 2012

SIGNIFICANT NEW AND HIGHER STANDARDS FOR CAUSE MARKETING: NEW YORK ATTORNEY GENERAL RELEASES REPORT ON "PINK RIBBON" CAMPAIGNS

The New York Attorney General ("NY AG") released a much-anticipated report on "pink ribbon" campaigns, last week. The report, entitled *Five Best Practices for Transparent Cause Marketing* (the "Best Practices"), available [here](#), originated from last year's NY AG initiative focused on breast cancer charities (widely covered by Venable; see links below). Although the NY AG initiative was specific to breast cancer charities, the Best Practices are broadly applicable to all cause-marketing efforts and will likely set a new bar by which the activities of companies and charities involved in these types of campaigns will be measured.

Background of Initiative

In October 2011, the NY AG celebrated National Breast Cancer Awareness Month by sending comprehensive questionnaires to at least 40 charities and over 130 companies asking for detailed information on promotions during which the sale of a product or service is advertised to benefit a charitable cause, in this case, breast cancer awareness. These types of promotional efforts that create goodwill for the company and generate income for a charity are commonly known as "cause-marketing" efforts and are classified as "commercial co-ventures" under New York law.¹

As cause-marketing efforts have grown in popularity, some have to come to question whether consumers are made aware of the relevant information in such promotions and whether the charities are actually receiving the benefits that consumers believe are promised. The NY AG likely had these critiques in mind when it sent out its questionnaire. The questionnaire, which consisted of 19 questions, some with subparts, dove into questions of compliance with the New York Charitable Solicitation Act, such as asking whether the company had a written contract with the charity in place and whether an accounting had been provided to the charity. The questionnaire also comprehensively inquired into the way in which the campaign was advertised to consumers, requesting copies of each "product label, advertisement, announcement, message or other marketing material."

Release of Best Practices

After a year of analyzing responses to the questionnaire on "pink ribbon" and other similar campaigns, on October 18, 2012, the NY AG held a press conference and released the Best Practices. The Best Practices appear to be intended as far-reaching reforms to the way in which some cause-marketing promotions are currently conducted.

The Best Practices go beyond the general "avoid deceptive fundraising practices" standard and offer recommended practices for specific types and forms of cause marketing – from social media free-action programs to one-to-one in-kind donation programs – used by many charitable organizations. This report is by far one of the most significant, if not the most significant, proactive forms of guidance any state Attorney General has ever issued in the area of cause marketing. An overview of the themes found in the specific recommendations of the Best Practices is below.

Expanded Disclosure Requirements

While many states' current regulations for cause marketing require that certain disclosures be given "on all advertising," the NY AG's Best Practices fill in the details and leave little to the discretion of the reasonable person. The list of items for disclosure is noticeably longer than any other state regulations currently require. Specifically, the Best Practices call for the following to be disclosed:

- the specific dollar amount per purchase that will go to the charity;
- the name of the charity;
- the charitable mission if not readily apparent from the name of the charity;
- whether consumer action is required for the charitable donation to be made; and

- the start and end dates of the campaigns.

By comparison, currently most other state statutes expressly require disclosure of (i) the name of the charity, (ii) the amount or percentage per unit that will be donated to the charity, and, sometimes (iii) the dates of the campaign.

Additionally, the Best Practices state that the expanded disclosures should be given on “advertisements, websites, and product packaging,” should be in “clear and prominent format and size,” and should be located “in close proximity” to the text of the advertisement. Depending upon the nature and structure of the campaign, adhering to this guidance may be challenging without additional examples from the NY AG.

Suggestion of “Donation Information” Label

The Best Practices take disclosures a step further in suggesting that each product in the promotion and website used to advertise the promotion showcase a “Donor Information” label which would be similar to a nutrition label on food items and would identify for donors key information about the campaign in a standardized format. While an innovative suggestion, it remains to be seen how proposed information labels and disclosures would be implemented in various advertising formats where space is often at a premium.

Attention to Social Media Campaigns

The Best Practices also push the bounds of current regulation by extending disclosure requirements to certain social media campaigns. While social media advertisements which encourage the purchase of a product or service with the promise of a donation to charity are covered under traditional regulation of cause marketing, free-action programs – such as liking a Facebook page or submitting contact information on a company website to trigger a donation – are not normally covered by the regulatory definition of a “commercial co-venturer.” This is because such promotions do not involve the element of a purchase or use of the company’s product or service as a prerequisite to the company’s donation. As the specific disclosure requirements for commercial co-venturers do not apply to such campaigns, they are usually subject to the more general standard of avoiding “unfair and deceptive” advertising.

The Best Practices state, however, that “companies and charities should be no less vigilant about transparency in social media cause-marketing campaigns than they are in traditional product-based campaigns.” This is one of the first times that a regulator has recognized free-action programs in social media to be under the umbrella of cause marketing. The Best Practices go on to recommend that social media cause-marketing programs disclose, at a minimum:

- the amount donated per action;
- the name of the charity that is benefitting;
- the dates of the campaign; and
- the minimum and maximum to be donated.

The Best Practices also recommend implementing a real-time tracking system to cut off the social media campaign when the maximum donation amount is reached or otherwise alert consumers that their action will no longer result in a donation, something that also has not been seen as a requirement in regulatory guidance. For companies and charities used to conducting social media campaigns on a more informal basis, complying with the suggested disclosures will take some careful planning.

Enforcement

In issuing its Best Practices, the NY AG took a unique approach to ensuring that the guidelines are followed, at least in pink ribbon promotions. At the time of the press release, the NY AG announced that the nation’s two largest breast cancer charities – Susan G. Komen for the Cure and the Breast Cancer Research Foundation – had both signed off on, and voluntarily agreed to follow, the NY AG Best Practices in all of their cause-marketing endeavors. This effectively means that a large number of companies that want to hold a pink ribbon promotion also will be playing by these new rules.

And while they have not been directly adopted into law, the guidelines contained in the Best Practices could be used by the NY AG and other state regulators to inform such regulators’ enforcement of general prohibitions against unfair and deceptive marketing as found in state mini-FTC Acts. If used as benchmarks for advertising standards, the Best Practices could have far-reaching effects on the ways in which charities and companies conduct cause-marketing campaigns.

Conclusion

Overall, the Best Practices reinforce the general legal principles that have always applied to companies

and charities conducting cause-marketing campaigns, but provide additional specific and concrete examples of disclosures to consider. A decision to disregard these standards could lead to a greater risk of investigation and enforcement. For companies considering cause-marketing campaigns, the new breadth of recommended disclosures in the Best Practices may take some planning and creative coordination to ensure compliant campaigns. Ultimately, it is possible and perhaps even likely that the Best Practices will provide a new norm as cause-marketing campaigns continue to generate goodwill for companies and increase revenue for charitable causes.

* * * * *

Venable's prior articles on the NY AG "Pink Ribbon" initiative can be found at:

- **[“Charitable Solicitation and Commercial Co-Venturer Red Flags: Insights for Charities and Marketers from the NY Attorney General”](#)**
- **[“Nineteen Questions Every Cause-Related Marketer Should be Prepared to Answer”](#)**
- **[“Cause-Related Marketing in the Crosshairs: What the New York Attorney General's Breast Cancer Investigation Means for Nonprofits and Their Corporate Supporters”](#)**

* * * * *

For more information, please contact **[Kristalyn Loson](#)** at 202-344-4522 or at **kjloson@Venable.com**, or **[Jonathan Pompan](#)** at 202-344-4383 or at **jlpompan@Venable.com**.

Kristalyn J. Loson is an Associate at Venable LLP in the Washington, DC office. She focuses her practice primarily on nonprofit organizations and associations. She represents nonprofit organizations engaged in charitable solicitation and advises for-profit companies on commercial co-venture regulation.

Jonathan Pompan is Of Counsel at Venable LLP in the Washington, DC office. He represents nonprofit and for-profit companies in regulated industries in a wide variety of areas including advertising and marketing law and financial services regulation compliance, as well as in connection with Federal Trade Commission and state investigations and law enforcement actions.

This article is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to a specific fact situation.

¹ New York Executive Law 7-A, Section 171-a(6) defines a “commercial co-venturer” as, “any person who for profit is regularly and primarily engaged in trade or commerce other than in connection with the raising of funds or any other thing of value for a charitable organization and who advertises that the purchase or use of goods, services, entertainment, or any other thing of value will benefit a charitable organization.