

Federal and State Regulators and Watchdog Groups Are Bearing Down on Charities and Their Professional Fundraisers: How to Prepare for the Regulatory Storm

Thursday, November 10, 2016, 12:30 pm – 2:00 pm ET

Venable LLP, Washington, DC

Moderator

Jeffrey S. Tenenbaum, Esq.

Partner and Chair of the Nonprofit Organizations Practice,
Venable LLP

Speakers

Anita K. Drummond, Esq.

Counsel, Nonprofit Organizations Practice, Venable LLP

Eric S. Berman, Esq.

Counsel, Nonprofit Organizations Practice, Venable LLP

Atitaya C. Rok, Esq.

Associate, Nonprofit Organizations Practice, Venable LLP



Presentation



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Agenda

- The Players
- Trends
- Legal Compliance
- Risk Management



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The Players: Regulators in the Game



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Pitcher

- Internal Revenue Service
 - Basic governance, conflicts always a focus
 - 18 pages of the Internal Revenue Manual for exams focus on fundraising activities
 - Professional fundraisers
 - Events and online fundraising
 - Solicitation and disclosures
 - Cash and noncash gifts
 - Reporting on Form 990 including Schedules G & M
 - Audit procedures for reviewing fundraising

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Catcher

- State Charity Regulators
 - Charity registration, reporting, and solicitation
 - Professional fundraisers and solicitors
 - Professional fundraising counsel
 - Commercial co-venturers

Regulators may be a charity office or within the state attorney general's office.

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First Baseman

- State Attorneys General



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Third Baseman

- Other state agencies with authority to regulate charities that can stall fundraising
 - Consumer protection
 - Special statutes or enforcement focus on telemarketers
 - Public utility commissions
 - Tax issues
 - Insurance commission and others for charitable gift annuities
 - Others

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Second Baseman

- Local agencies
 - Canvassing permits
 - Event licenses
 - Local registrations



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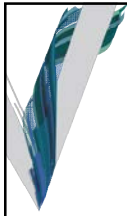
Outfield

- Federal Trade Commission
 - FTC Act § 5 prohibits deceptive practices
 - Telemarketing Sales Rule
 - Broad ability to get relief in federal court - § 13(b)
- Media
- Whistleblowers
- Charitable ratings/watchdog agencies
 - BBB Wise Giving Alliance, Charity Navigator, Charity Watch, GuideStar

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Trends

Enforcement Collaboration

Data

Law

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Trends in Enforcement



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Fundraising Is Focus

#1 Enforcement area in the sector is fundraising

Source: 2015 Report by the Columbia Law School National State Attorneys General Program and the Urban Institute



Enforcement Trends

- Regulators are collaborating
FTC, 50 States, and D.C. v. Cancer Fund of America, Inc.





Enforcement Trends – Obvious

- Using fake names and/or failing to make proper disclosures
- Changing names of charities to sound like other, similar charities
- Misrepresenting charity's program services
- Filing false or incomplete registrations and financial reports with the state

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State Regulators Involving the Public

Half of regulated states have hotlines to report charities

Source: 2015 Report by the Columbia Law School National State Attorneys General Program and the Urban Institute

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Enforcement Involving Fundraising

- [2014 - *Quadriga*](#)
 - \$25 million settlement with New York Attorney General for direct-mail fundraising abuses
- [2014 - *Strategic Fundraising, Inc.*](#)
 - \$1.054 million fine by South Carolina Secretary of State for failure to make mandatory disclosures, misrepresentation, failure to register individual solicitors



Lessons from Stipulated Orders with State AGs

- Truthful language in fundraising (or marketing) language about the purpose
- Control of solicitation messaging and brand by charity
- Unambiguous identification of professional fundraising company
- Truthful about being paid to solicit
- Use caging services
- Deliver pre- and post-solicitation disclosures
- Recordkeeping that includes scripts, recorded calls, and persons contacted
- Records of complaints and process of resolution
- Strong subcontractor controls
- Truthful in identifying charity's headquarters location and avoid using misleading "local" postal addresses



Enforcement Collaboration


- National Association of Attorneys General's new Charities Committee formed in late 2015

"to promote the development of effective charities registration *and enforcement programs* . . ." [emphasis added]



Trends in Data





Collaboration Among States on Data and Information

- Historical
 - National Association of Attorneys General/National Association of State Charity Officials (NAAG/NASCO) annual conference (with one “public day”)
 - Charleston Principles
 - Unified Registration Statement
- New Efforts by NAAG/NASCO
 - **Single Portal Initiative**

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Single Portal Initiative

- 13 pilot states with intention to cover all states with registration requirements
- Charities and professional fundraisers will register
- <http://mrfpinc.org/>



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State Regulator Efforts

- 82% of state regulators update the media on their charity oversight by news releases
- 1 in 3 regulators publish an annual report
- Some states have specialized reports on fundraising



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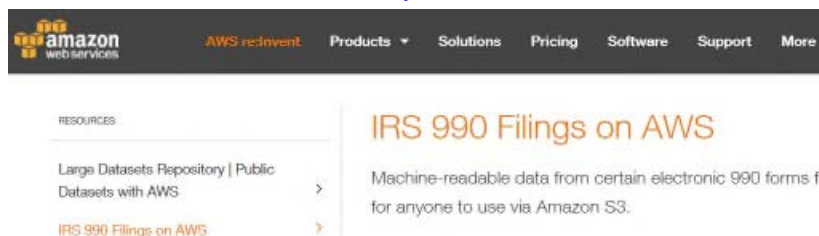
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IRS Form 990 Data Machine Readable

- June 2016 IRS announced machine-readable format of Forms 990 from 2011 until present through Amazon Web Services

www.aws.amazon.com/public-datasets/irs-990/



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More Information in 2016

- GuideStar Nonprofit Profiles and Charity Check
 - Watch lists and automated email alerts
- Charity Navigator Advisory system
 - Three levels of concern:
 - “Low”** – Media stories, third-party evaluations, affiliate issues
 - “Moderate”** – Allegations of fraud, incomplete or inaccurate Forms 990, charities that “do not complete the schedule of expenses for fundraising,” audit issues, AG initial investigation
 - “High”** – Fake charity claims, confirmed fraud or improper activity

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More Data

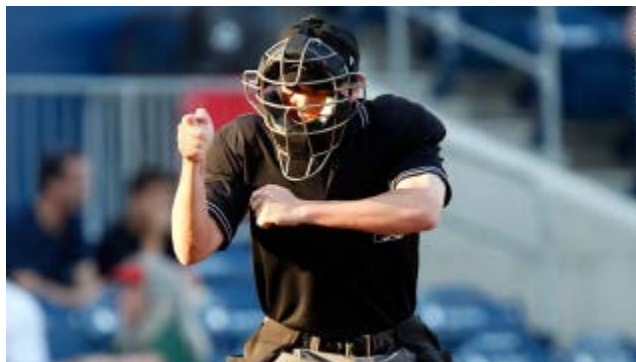
- Cause IQ
 - Markets to large companies “intelligence on everything and everyone in the nonprofit sector”
- Citizenaudit.org
 - Keyword searches of full text of nonprofit IRS Forms 990

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Trends in Law



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Increasing Nuances in State Legislation, Regulation, and Forms

- Directors personally liable for losses or failure to control
- Paperwork violations for “incomplete financial report” for charitable registration with serious consequences
- Enhanced focus on conflicts with directors, officers, and key employees
- Higher expectations for audit oversight
- More triggers for imposing state income tax or corporate excise taxes
- Property tax exemption laws at state and local levels becoming more difficult to maintain or obtain
- Localized interest in charity rules

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Legal Compliance



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Acknowledge Complexity

- IRS
- States agencies
- Local governments
- Federal Trade Commission
- Consumer Financial Protection Bureau
- Other federal agencies



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IRS Form 990

- Reporting on organizational finances, purpose, management, conflicts, and other information
- Reporting fundraising
 - Overall fundraising expenses
 - Professional fundraising expenses and revenue
 - Fundraising events performance
 - Cash and noncash contribution
 - State charitable solicitation registration

SCHEDULE G
(Form 990 or 990-EZ)

Supplemental Information Regarding Fundraising or Gaming Activities
Complete if the organization answered "Yes" on Form 990, Part IV, line 17, 18, or 19, or if the organization entered more than \$15,000 on Form 990-EZ, line 5a.
▶ Attach to Form 990 or Form 990-EZ.
▶ Information about Schedule G (Form 990 or 990-EZ) and its instructions is at www.irs.gov/form990.

OMB No. 1545-0047
2016
Open to Public Inspection

Name of the organization _____ Employer identification number _____

Part I Fundraising Activities. Complete if the organization answered "Yes" on Form 990, Part IV, line 17. Form 990-EZ filers are not required to complete this part.

1 Indicate whether the organization raised funds through any of the following activities. Check all that apply.

a <input type="checkbox"/> Mail solicitations	e <input type="checkbox"/> Solicitation of non-government grants
b <input type="checkbox"/> Internet and email solicitations	f <input type="checkbox"/> Solicitation of government grants
c <input type="checkbox"/> Phone solicitations	g <input type="checkbox"/> Special fundraising events
d <input type="checkbox"/> In-person solicitations	

2a Did the organization have a written or oral agreement with any individual (including officers, directors, trustees, or key employees listed in Form 990, Part VII) or entity in connection with professional fundraising services? ☐ Yes ☐ No

b If "Yes," list the 10 highest paid individuals or entities (fundraisers) pursuant to agreements under which the fundraiser is to be compensated at least \$5,000 by the organization.

(i) Name and address of individual or entity (fundraiser)	(ii) Activity	(iii) Did fundraiser have custody or control of contributions?		(iv) Gross receipts from activity	(v) Amount paid to (or retained by) fundraiser listed in col. (i)	(vi) Amount paid to (or retained by) organization
		Yes	No			
1						

Schedule G (Form 990 or 990-EZ) 2015 Page **2**

Part II Fundraising Events. Complete if the organization answered "Yes" on Form 990, Part IV, line 18, or reported more than \$15,000 of fundraising event contributions and gross income on Form 990-EZ, lines 1 and 6b. List events with gross receipts greater than \$5,000.

	(i) Event #1 (event type)	(ii) Event #2 (event type)	(iii) Other events (total number)	(iv) Total events (add col. (i) through (iii), (v))
Revenue				
1 Gross receipts				
2 Less: Contributions				
3 Gross income (line 1 minus line 2)				
Direct Expenses				
4 Cash prizes				
5 Noncash prizes				
6 Rent/facility costs				
7 Food and beverages				
8 Entertainment				
9 Other direct expenses				
10 Direct expense summary. Add lines 4 through 9 in column (d)				
11 Net income summary. Subtract line 10 from line 3, column (d)				

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State Compliance – Charitable Organization

- Currently, 39 states and DC require charities to register when conducting solicitations
- Common registration requirements
 - Registration and renewal annually
 - Disclosures when soliciting (e.g., identification of state office where financial reports filed, verbatim written disclosures)
 - Annual financial reporting
 - Notification and reporting on professional fundraiser, fundraising consultant, or commercial co-venture relationships

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State Solicitation Notices: 11 states

Florida: A COPY OF THE OFFICIAL REGISTRATION AND FINANCIAL INFORMATION MAY BE OBTAINED FROM THE DIVISION OF CONSUMER SERVICES BY CALLING TOLL-FREE, 1-800-HELP-FLA WITHIN THE STATE OR VIA THE INTERNET WWW.800HELPFLA.COM. REGISTRATION DOES NOT IMPLY ENDORSEMENT, APPROVAL, OR RECOMMENDATION BY THE STATE. FL REGISTRATION # ____.

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State Compliance – Fundraising Professionals Defined

- **Professional solicitor** – for a fee or other compensation, solicits on behalf of a charity or has custody and control of funds
- **Fundraising consultant** – for a fee or other compensation, manages, advises, plans, produces, or designs a solicitation, but does not directly solicit or hold funds

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State Compliance – Fundraising Professionals

- Approximately 42 states require registration and other requirements for professional solicitors and fundraising consultants
 - Registration
 - Bond
 - Filing of contracts
 - Disclosures
 - Regular reporting on performance



State Compliance – Fundraising Professionals

- Often mandatory contractual provisions
 - Statement of charitable purpose
 - Charity right to rescind
 - Campaign dates
 - Percentage of contributions to charity vs. fundraising professional
 - Script and solicitation content control by charity
 - Funds delivered within 48 hours
 - Signed by board member



Commercial Co-Ventures (CCVs)

- 26 states *regulate* CCVs
- A **charitable sales promotion** is an arrangement between a charity and a commercial entity, called a **commercial co-venture**, under which the commercial entity advertises that the purchase or use of its goods or services will benefit a charity or charitable purpose

"Every time you buy a bottle of ECO between June 1 and December 31, 2016, 5 cents will go to the Earth Foundation, up to a maximum of \$25,000."

- Not charitable giving, but generally a "royalty" payment that is scrutinized as a fundraising activity by states
- Many states require filing the contract, forms submitted by both the charity and the commercial co-venturer

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State Compliance - Commercial Co-Ventures

- Registration and Notification
 - **CCV Responsibility** – Alabama (bond), California, Hawaii, Illinois, Massachusetts (bond), Mississippi and South Carolina
 - **Charity Responsibility** - Arkansas, Connecticut, New Hampshire, New Jersey, and Utah
- Mandatory Contractual Provisions
 - Dates of solicitation, amount to be donated, geographic scope, charity ability to cancel
- Disclosure Requirements
- Campaign Financial Reports

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Federal Trade Commission (FTC)

- Section 5 of the Federal Trade Commission Act prohibits “unfair or deceptive acts or practices in or affecting commerce”
 - Truthful marketing
 - Substantiation
 - Material Relationships
- FTC’s Telemarketing Sales Rule 16 CFR Part 310
- Broad ability to get injunctive relief in federal court under Section 13(b) of FTC Act to remedy “any provision of law enforced by the Federal Trade Commission.
- The FTC does not have jurisdiction over *bona fide* charities, but...

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Mitigate Risk: Solicitation Hazards

- Misrepresenting the nature of the charity’s purpose or activities
- Misrepresenting that donations will benefit persons or organizations in the donor’s state or local community **unless** a substantial portion goes to that state or local community
- Misrepresenting that donations will go to a specific purpose or program **unless** a minimum amount of donations will actually be used for the purpose or program

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Mitigate Risk: Solicitation Hazards

- Promising a cap on overhead expenses or as a part of the donation without substantiation
- Using script or printed materials that have not been vetted and/or substantiated
- Harassing or intimidating solicitation conduct
- Implying or indicating that a charity or fundraising professional is “endorsed” by regulators
- Misrepresenting a portion of the donations that will be retained by charity and the professional fundraiser or commercial co-venturer

Stay Alert to Federal Trade Commission Trends

FEDERAL TRADE COMMISSION

ESPAÑOL

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FTC examines crowdfunding

October 26, 2016
by Colleen Tressler
Consumer Education Specialist, FTC

Crowdfunding is the use of online platforms to fund a project or cause by raising money from a large number of people.

As part of its FinTech series, the FTC will take a closer look at crowdfunding during a half-day forum today, October 26. We're excited to hear from experts, consumers, and businesses.

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November 4, 2016
- FTC helps teach teachers about financial literacy
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- FTC sues phone scammers

Risk Mitigation



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Basics of Compliance in Your Operations

- Consistent and accurate system for tracking fundraising expenses and revenue
- Leadership tone (consider compliance officer)
- Train and educate staff, including fundraisers, finance, management, etc., on legal compliance
- Standard contracts that reflect the law, audit rights, and exit terms, among other provisions
- Registration and reporting controls
- Solicitation content approval processes
- Audits for financial and reporting compliance

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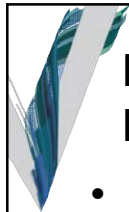
Charitable Organization's Risk Management

- Management and staff understand legal complexities and investment in compliance
- Board role in contract commitments and oversight
- Regulate every use of your name and brand
- Contractor vetting procedures:
 - References
 - Review public records on current registration and reporting (or enforcement actions)
 - Review data and financial controls
 - Controls for subcontractors

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Fundraising Professional's Risk Management

- Evaluate the charity
 - Purpose, size, and scope of program services
 - Geographic reach (national vs. local)
 - Review IRS Form 990, website, social media
- Confirm states' registration name and numbers
- Contract terms to include warranties that charity is using funds for represented purposes, etc.
- Review scripts frequently to substantiate claims
- Monitor solicitation activity of fundraiser's staff
- Vet subcontractors and require additional registrations

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Questions?

Jeffrey S. Tenenbaum, Esq.

Partner and Chair of the Nonprofit Organizations Practice, Venable LLP

JSTenenbaum@Venable.com

202.344.8138

Anita K. Drummond, Esq.

Counsel, Nonprofit Organizations Practice, Venable LLP

ADrummond@Venable.com

202.344.4450

Eric S. Berman, Esq.

Counsel, Nonprofit Organizations Practice, Venable LLP

ESBerman@Venable.com

202.344.4661

Atitaya C. Rok, Esq.

Associate, Nonprofit Organizations Practice, Venable LLP

ACRok@Venable.com

202.344.4601

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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
Tax Controversies and Litigation
Tax Policy
Tax-Exempt Organizations
Regulatory

INDUSTRIES

Nonprofit Organizations

GOVERNMENT EXPERIENCE

Legislative Aide, United States
House of Representatives

BAR ADMISSIONS

District of Columbia

EDUCATION

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

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

MEMBERSHIPS

Jeffrey Tenenbaum chairs Venable's Nonprofit Organizations Practice Group. He is one of the nation's leading nonprofit attorneys, and also is a highly 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 only a handful of "Leading Lawyers" in the Not-for-Profit category in the prestigious *Legal 500* rankings for the last four years (2012-15). Mr. Tenenbaum was recognized in 2013 as a Top Rated Lawyer in Tax Law by *The American Lawyer* and *Corporate Counsel*. He was the 2015 recipient of the New York Society of Association Executives' Outstanding Associate Member Award, 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 2012-17 editions of *The Best Lawyers in America* for Non-Profit/Charities Law, and was selected for inclusion in the 2014-16 editions 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
Academy of Television Arts & Sciences
Air Conditioning Contractors of America
Air Force Association
Airlines for America
American Academy of Physician Assistants
American Alliance of Museums
American Association for the Advancement of Science
American Bar Association
American Cancer Society
American College of Cardiology
American College of Radiology

American Society of Association
Executives

American Council of Education
American Institute of Architects
American Nurses Association
American Red Cross
American Society for Microbiology
American Society of Anesthesiologists
American Society of Association Executives
America's Health Insurance Plans
Association for Healthcare Philanthropy
Association for Talent Development
Association of Clinical Research Professionals
Association of Corporate Counsel
Association of Fundraising Professionals
Association of Global Automakers
Association of Private Sector Colleges and Universities
Auto Care Association
Better Business Bureau Institute for Marketplace Trust
Biotechnology Innovation Organization
Brookings Institution
Carbon War Room
CFA Institute
The College Board
CompTIA
Council on Foundations
CropLife America
Cruise Lines International Association
Democratic Attorneys General Association
Design-Build Institute of America
Entertainment Industry Foundation
Erin Brockovich Foundation
Ethics Resource Center
Foundation for the Malcolm Baldrige National Quality Award
Gerontological Society of America
Global Impact
Good360
Goodwill Industries International
Graduate Management Admission Council
Habitat for Humanity International
Homeownership Preservation Foundation
Human Rights Campaign
Independent Insurance Agents and Brokers of America
InsideNGO
Institute of International Education
International Association of Fire Chiefs
International Rescue Committee
International Sleep Products Association
Jazz at Lincoln Center
LeadingAge
The Leukemia & Lymphoma Society
Lincoln Center for the Performing Arts
Lions Club International
March of Dimes
ment'or BKB Foundation
National Air Traffic Controllers Association
National Association for the Education of Young Children
National Association of Chain Drug Stores
National Association of College and University Attorneys
National Association of College Auxiliary Services
National Association of County and City Health Officials
National Association of Manufacturers
National Association of Music Merchants
National Athletic Trainers' Association
National Board of Medical Examiners
National Coalition for Cancer Survivorship
National Coffee Association

National Council of Architectural Registration Boards
National Council of La Raza
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
New Venture Fund
NTCA - The Rural Broadband Association
Nuclear Energy Institute
Peterson Institute for International Economics
Professional Liability Underwriting Society
Project Management Institute
Public Health Accreditation Board
Public Relations Society of America
Romance Writers of America
Telecommunications Industry Association
The Tyra Banks TZONE Foundation
U.S. Chamber of Commerce
United States Tennis Association
Volunteers of America
Water Environment Federation
Water For People
WestEd
Whitman-Walker Health

HONORS

Recipient, New York Society of Association Executives' Outstanding Associate Member Award, 2015

Recognized as "Leading Lawyer" in *Legal 500*, Not-For-Profit, 2012-15

Listed in *The Best Lawyers in America* for Non-Profit/Charities Law (Woodward/White, Inc.), 2012-17

Selected for inclusion in *Washington DC Super Lawyers*, Nonprofit Organizations, 2014-16

Served as member of the selection panel for the *CEO Update* Association Leadership Awards, 2014-16

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 Advisory Panel of Wiley/Jossey-Bass' *Nonprofit Business Advisor* newsletter and on the American Society of Association Executives' Public Policy Committee. He previously served as Chairman and as a member of the ASAE *Association Law & Policy* 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.



Anita K. Drummond

Counsel

Washington, DC Office

T 202.344.4450 F 202.344.8300

akdrummond@Venable.com

AREAS OF PRACTICE

Regulatory

Tax-Exempt Organizations

INDUSTRIES

Nonprofit Organizations

GOVERNMENT EXPERIENCE

Advocate and Assistant Chief Counsel, Small Business Administration

BAR ADMISSIONS

Virginia

Not admitted in the District of Columbia

EDUCATION

J.D., George Mason University, 2000

Chief Justice, Moot Court

President, George Mason American Inn of Court

Dean Scholar

B.A., University of Central Florida, 1988

Anita Drummond is a member of Venable's nonprofit organizations practice group. She has significant experience working in-house for nonprofit organizations and for the federal government, as well as in private practice. She is well versed in the broad range of legal issues facing nonprofits, and is very focused on using the law to help nonprofits further their mission and achieve their goals.

Prior to joining Venable, Ms. Drummond spent nearly a decade at The Nature Conservancy, an international NGO, most recently as associate general counsel. In this role, she managed the organization's internal and external legal counsel on federal tax exemption and charity regulation, private and public funding, government relations, finance and taxes, human resources, insurance, conservation services, marketing, intellectual property, and technology. She also led the development and implementation of a focused internal legal practice for innovative programs, such as social impact investment, and for the specialized legal needs of domestic and international clients.

Ms. Drummond's other in-house nonprofit experience includes stints as Director of Legal and Regulatory Affairs for the Associated Builders and Contractors, Director of Government Relations for the American Subcontractors Association, and Manager of Public Affairs for the American Council of Independent Labs. She also worked for the U.S. Small Business Administration as an advocate and assistant chief counsel. In private practice, Ms. Drummond represented corporate and individual clients in civil litigation and served as a court-appointed child advocate.

PUBLICATIONS

- September 22, 2016, Global Business: Partners out of the US
- September 21, 2016, Are You Ready to Work with Corporate Partners?
- September 21, 2016, Setting the Stage for Corporate Partners
- August 15, 2016, Nonprofit Fundraising and Revenue Generation through a Legal Lens: Everything Non-Attorneys Need to Know
- August 2016, Overview of State Regulation of Charitable Organizations
- August 2016, When the Convention Parties Are Over: How Public Charities Can Be Involved in the 2016 Elections and Talk about the Issues, Nonprofit and Political Law Alert
- July 11, 2016, Working Effectively with Outside Counsel: What Every Nonprofit Should Know
- June 2016, Federal Grants and Contract News for Nonprofits - June 2016
- June 2016, How to Scope, Select and Use Outside Counsel
- June 2016, Nonprofit Considerations for Legal Counsel

SPEAKING ENGAGEMENTS

- November 10, 2016, Federal and State Regulators and Watchdog Groups Are Bearing Down on Charities and Their Professional Fundraisers: How to Prepare for the Regulatory Storm
- October 17, 2016, "Operating Abroad: A Primer for US Nonprofit Operations Overseas" at the 2016 ACC Annual Meeting (Nonprofits Organizations Committee)
- August 15, 2016, "Nonprofit Fundraising and Revenue Generation through a Legal Lens: Everything Non-Attorneys Need to Know" at the 2016 ASAE Annual Meeting & Expo
- July 12, 2016 - July 14, 2016, "How to Scope, Select and Use Outside Counsel," InsideNGO 2016 Annual Conference
Anita K. Drummond
- June 16, 2016, "Non-Profit and Associations and Global Issues Forum: Taking Your Organization Global – An Overview for NFP Organization," hosted by Association Corporate Counsel
Anita K. Drummond



Eric S. Berman

Counsel

Washington, DC Office

T 202.344.4661 F 202.344.8300

esberman@Venable.com

AREAS OF PRACTICE

Regulatory
Antitrust
Advertising and Marketing
Class Action Defense
Mergers and Acquisitions
Investigations and White Collar Defense
State Attorneys General
Tax-Exempt Organizations

INDUSTRIES

Consumer Products and Services
Dietary Supplements, Cosmetics and Functional Foods
Nonprofit Organizations

BAR ADMISSIONS

District of Columbia
New York

EDUCATION

J.D., George Washington University Law School, 2002
B.S., Cornell University, 1999

MEMBERSHIPS

Eric Berman's client service primarily involves counseling, regulatory advocacy, and litigation defense in the areas of consumer protection and antitrust. He represents large companies, trade associations, tax-exempt organizations, and closely held businesses before both the consumer protection and competition bureaus of the Federal Trade Commission ("FTC"), the Department of Justice's Antitrust Division ("DOJ"), and the state attorneys' general.

As part of Venable's highly regarded advertising practice, Mr. Berman advises national retailers, manufacturers, nonprofits, fundraisers, telemarketers, financial services firms, and dietary supplement sellers on how to reduce risk associated with their advertising claims, marketing practices, and business operations. His practice increasingly focuses on helping organizations navigate complex and sometimes multi-faceted law enforcement investigations by federal and state regulators. Recently, Mr. Berman was lead defense counsel to multiple parties in the first consumer protection lawsuit ever filed by the FTC, all 50 state attorneys general, and the District of Columbia.

Mr. Berman is also an experienced antitrust attorney who has represented merging parties and third parties in complex merger reviews before the FTC, DOJ, and foreign competition authorities. He has also defended market-leading firms in complex litigation brought under Section 1 of the Sherman Act. Mr. Berman maintains a broad-based counseling practice in which he advises companies and associations about the antitrust risks associated with a range of business issues, and he has experience conducting internal investigations and implementing compliance programs for antitrust-sensitive firms.

SIGNIFICANT MATTERS

Consumer Protection and Advertising

- Lead counsel to multiple nonprofits and their principals in sweeping FTC and 50-state litigation;
- Co-lead counsel to national charitable organization during pendency of state attorney general investigation;
- Co-lead counsel for dietary supplement marketer in FTC false advertising investigation of weight loss claims;
- Advertising counsel to leading home products retailer;
- Lead counsel for window manufacturer in FTC industry sweep of energy efficiency claims;
- Lead counsel for building and home materials seller in FTC action involving insulation performance claims; continue to serve as general FTC compliance and unfair competition counsel;

ABA, Section of Antitrust Law
DC Bar Association, Antitrust and
Consumer Law Section
DRI, Program Chair, Antitrust &
Consumer Protection Group

- Co-lead counsel to UK-based conglomerate against attempted injunction lawsuit filed by FTC's Northwest Regional office involving debt collection activities.

Antitrust – Mergers, Litigation and Counseling

- Represented third party in major FTC merger challenge in the foodservice distribution industry;
- Advising multiple companies on compliance issues and information exchanges;
- Reviewed and updated global antitrust compliance program for market leading merchant and manufacturer;
- Advised pediatric physicians' association on antitrust issues relating to formation of children's hospital;
- Defended major consumer electronics company in price-fixing litigation brought by private plaintiffs; led defense of related *parens patriae* actions brought by State Attorneys General;
- Represented acquiring and acquired firms before U.S. and foreign competition authorities in the antitrust review of multiple large-scale transactions.

SPEAKING ENGAGEMENTS

- November 10, 2016, Federal and State Regulators and Watchdog Groups Are Bearing Down on Charities and Their Professional Fundraisers: How to Prepare for the Regulatory Storm
- March 17, 2016, "Sports Report: Sports, Consumer Protection, and Antitrust - What's Hot in 2016!" for the American Bar Association Antitrust Section
- January 21, 2016, "Spotting Deceptive Marketing Issues When Your Company Uses Social Media" for DRI's Corporate Counsel Committee
- October 7, 2015, "Complex Litigation Against Nonprofits in the Consumer-Protection Context: A War on Multiple Fronts" at the 2015 DRI Annual Meeting
- September 30, 2015, "Protecting Your Brand From Online Fraud, Infringement & Other Emerging Threats" at the Search Marketing Expo – East
- September 10, 2015, Somebody's Watching Us: Considerations for Nonprofits Operating under Increased Government Scrutiny
- August 11, 2015, "State Attorneys General Developments (July 2015)" for the ABA Antitrust Section Consumer Protection Monthly Update
- April 29, 2015, "Is Calling Puff a 'Magic' Dragon Puffing?" for an Advertising Law Symposium Hosted by Venable LLP
- February 19, 2015, "The Sports Report: Sports, Consumer Protection, and Antitrust – A Year in Review" for the American Bar Association
- June 13, 2014, "Understanding Antitrust & Competition Strategies" for The Knowledge Group (webcast)
- February 20, 2013, "Antitrust Basics For Legal Recruitment Professionals" for the Washington Area Legal Recruitment Administrators Association (WALRAA)
- February 23, 2011, "Introduction to U.S. Merger Enforcement" for the Howrey Antitrust Fundamentals Seminar
- February 25, 2009, "Sherman Act Section One" for the Howrey Antitrust Fundamentals Seminar



Atitaya C. Rok

Associate

Washington, DC Office

T 202.344.4601 F 202.344.8300

acrok@Venable.com

AREAS OF PRACTICE

Tax-Exempt Organizations
Political Law
Regulatory

INDUSTRIES

Nonprofit Organizations

BAR ADMISSIONS

Virginia (inactive)
District of Columbia

EDUCATION

J.D., *cum laude*, Duquesne
University School of Law, 2009
B.S., *cum laude*, Virginia
Polytechnic Institute and State
University, 2006

MEMBERSHIPS

American Bar Association
Business Law Section, Nonprofit
Organizations Committee

LANGUAGES

Thai

Atitaya C. Rok is an associate in Venable's Nonprofit Organizations and Political Law Practice Groups in Washington, D.C. Ms. Rok advises nonprofit organizations, including public charities, private foundations, trade and professional associations, and for-profit corporations on a variety of charitable fundraising matters, including charitable solicitation regulation compliance and commercial co-venture campaigns. She also works with both nonprofit and for-profit clients in political law compliance, including registration and reporting at the federal, state and local levels, and overall legal and regulatory compliance. Ms. Rok also advises nonprofit clients on contractual, corporate governance, and general corporate matters.

Prior to joining Venable, Ms. Rok served as in-house counsel for a nonprofit organization in Washington, D.C., where she helped launch the organization's development efforts and worked extensively in the related legal and regulatory compliance areas.

ACTIVITIES

During law school, Ms. Rok was a law clerk in the Civil Litigation and Torts Litigation sections at the Pennsylvania Office of Attorney General. She also was an active member of Duquesne's Women's Law Association.

PUBLICATIONS

- September 21, 2016, Setting the Stage for Corporate Partners
- March 2016, *Association TRENDS* 2016 Legal Review
- December 2015, The New IRS Proposal on Substantiation Requirements for Charitable Contributions: What Could It Mean for Nonprofits?
- December 1, 2015, Charitable Solicitation and Associations
- October 9, 2015, Public Day Review: Highlights of the State Charity Regulator 2015 NAAG/NASCO Annual Conference
- October 6, 2015, Payment Processing for Charities Engaged in Fundraising under Government Scrutiny
- May 6, 2015, Federal Appeals Court Affirms Mandatory Filing of Unredacted Donor List by Charities Registered for Solicitations in California

SPEAKING ENGAGEMENTS

- November 10, 2016, Federal and State Regulators and Watchdog Groups Are Bearing Down on Charities and Their Professional Fundraisers: How to Prepare for the Regulatory Storm



Additional Information



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Regulatory & Litigation Developments for Advertisers and Marketers

Don't Let "Pink" Marketing Lead to Others Seeing Red

BY ERIC S. BERMAN ON NOVEMBER 2, 2016

Among other things (National Pizza Month, anyone?), October was Breast Cancer Awareness Month and the *Washington Post* recently published an interesting article about the connection between retail apparel marketing and breast cancer awareness efforts. The combination of the two – “pink marketing” – is as ubiquitous during the month of October as Halloween candy and pumpkin-spiced lattes.

Over time, cancer charities have sought to increase donor awareness of their mission and boost fundraising by partnering with for-profit corporations. This cause-related marketing can be mutually beneficial: the charity is helped by the company's marketing budget and public relations heft, while the company enhances its goodwill with customers (indeed, some research supports the notion of a “halo effect” for retailers that consumers believe are socially conscious). Thus, we see successful partnerships like the one featured in the *Washington Post* article between the National Football League and the American Cancer Society, or relationships between World Wrestling Entertainment and Susan G. Komen. In October, hulking athletes incorporate pink into their uniforms and leap from pink wrestling ropes. Celebrities wear pink ribbons and retailers offer pink-colored versions of their products. Even the White House goes pink.



Something else happens during October that is less publicized, but just as significant to those of us who live at the intersection of advertising law and charity solicitation regulations. October is when the National Association of Attorneys General (NAAG) and the National Association of State Charity Officials (NASCO) host their Annual Meeting in Washington, DC. The NAAG/NASCO conference brings together federal and state law enforcers, outside counsel, watchdog groups and leading industry thinkers to discuss issues such as corporate governance, nonprofit fundraising and enforcement trends. The 2016 NAAG/NASCO Annual Meeting took place two weeks ago, and day one of the three-day conference was open to the public. To read more about the Public Day of this year's conference, [click here](#).

One key takeaway from this year's NAAG/NASCO Annual Meeting is that state charity regulators are becoming smarter about the non-traditional forms of philanthropy that have arisen over the past decade. From for-profit companies that invest in charitable endeavors (but are not themselves charitable foundations) to low-profit limited liability corporations, charity regulators have caught on to the fact that, as Twitter co-founder Biz Stone remarked in 2014, “the future of marketing is philanthropy.” Another key lesson from NAAG/NASCO is that state charity officials are sharing information and cooperating with each other (and in some cases with federal law enforcers, like the Federal Trade Commission (FTC)) to a greater

extent than ever before.

Given the increased scrutiny facing charitable solicitation activity, and the amplified attention being paid to for-profit/nonprofit commingling, we offer some considerations for charitable organizations, fundraisers, and for-profit marketers. **First**, be mindful that certain relationships between charities and for-profit brands can constitute a commercial co-venture (CCV). CCVs are regulated in about half of the states, and common regulatory requirements include a written agreement between the charity and company, registration and bonding with the state, and certain advertising disclosures.

Second, remember that regulators favor transparency. Will a percentage of a consumer's purchase go directly to a charity? Instead, does the for-profit company merely "support" a certain cause but not fund it through consumer sales? As the Washington Post article notes, oftentimes consumers think that they are supporting a breast cancer charity when they purchase a pink article of clothing, when that is not true. Consumers now associate certain colors with certain charitable causes (pink with fighting breast cancer, or red with fighting AIDS). A retailer who exploits those consumer associations with explicit or implicit claims that the purchase of certain goods will support popular causes may face scrutiny if those claims are not true.

Third, charity fundraisers should take efforts to substantiate the claims they make to donors on behalf of a charitable organization. There are numerous claims that the FTC would consider material to a donor's decision, including the percentage of the donation that reaches the charity, the nature of the charitable programs that the charity conducts, and whether the donation will support local recipients or be disbursed nationally. There is no charity safe harbor here: the FTC will expect a for-profit solicitor to substantiate claims made to donors in the same way that it would expect a dietary supplement marketer to substantiate weight loss claims.

Regulators know that marketing "pink" can earn retailers a lot of "green," and will continue to keep a close eye on the marketplace as the line between for-profit and nonprofit blurs.

ALL ABOUT

ADVERTISING LAW

Venable LLP

575 7th Street, NW
Washington, DC 20004
Phone: 202.344.4000
Fax: 202.344.8300

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STRATEGY, DESIGN, MARKETING & SUPPORT BY **LEXBLOG**

AUTHORS

Eric S. Berman
Atitaya C. Rok
Jeffrey S. Tenenbaum

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October 21, 2016

HIGHLIGHTS OF THE 2016 NAAG/NASCO CHARITY REGULATORS' ANNUAL CONFERENCE

The National Association of Attorneys General (NAAG) and the National Association of State Charity Officials (NASCO) convened for their 2016 Annual Conference in Washington, DC this week. The "Public Day" of the conference, held on Monday, October 16, provided an opportunity for nonprofit leaders, professional counselors and advisers, and academics to learn about "the evolving world of state charities regulation," which was the theme of this year's conference.

The public session included informative panel discussions on non-traditional models of philanthropy; regulation of donor-advised funds, endowments, and restricted gifts; top issues in corporate governance and the importance of nonprofit board education; new tools for the nonprofit sector; current trends in cybersecurity and how to handle data breaches; and the collaboration between the Federal Trade Commission (FTC) and regulators from all 50 states and the District of Columbia in the historic civil suit against four cancer charities in 2015. The final panel of the public session featured state attorneys general of the NAAG Charities Committee discussing how the regulation of charities has evolved over time and what to expect in the years to come.

Below are some highlights of the Public Day of the 2016 NAAG/NASCO Annual Conference:

Non-Traditional Models of Philanthropy

The public session commenced with a panel discussing the increasing popularity of non-traditional forms of philanthropy. In late 2015, Facebook founder Mark Zuckerberg and his wife, Priscilla Chan, pledged 99% of their wealth to charity and launched the Chan-Zuckerberg Initiative (CZI) to manage their contributions. However, CZI is not a charitable foundation or trust; instead, it is a for-profit, limited liability company. In recent years, regulators have seen an increase in the formation of entities like CZI, as well as benefit corporations, low-profit limited liability companies (L3Cs), and social-purpose corporations. These new business models often are for-profit entities that prioritize charitable or social purposes over profit maximization, or simply for-profit business entities (such as CZI) that provide their owners with maximum flexibility as to how to pursue charitable and social goals through a less-regulated business model. The entities are able to leverage financial, intellectual, technological, and network resources to a much greater degree than traditional nonprofits. Many states have passed legislation adopting some of these hybrid business models—providing parameters for regulators in their oversight and enforcement of the same—while others remain largely unrelated.

Making Nonprofit Data More Publicly Accessible

The availability of data on nonprofit organizations promotes transparency and accountability, and it aids regulators in their ability to oversee the activities of organizations and take enforcement actions when necessary. In recent years, both public and private efforts have been undertaken to make data on nonprofit organizations more accessible to the general public.

- *IRS Form 990.* In June 2016, the Internal Revenue Service (IRS) announced the public availability of data on electronically filed Forms 990, which is the IRS's primary tool for obtaining information about tax-exempt organizations, from 2011 to present, in a machine-readable format through Amazon Web Services. However, the data does not include donor information or other personally identifiable information.
- *Single Portal Project.* The single portal project is an initiative of NAAG and NASCO, working together with the Multistate Registration and Filing Portal, Inc. (MRFP), a Delaware nonprofit corporation, to develop an online system that will streamline the state registration and annual filing requirements for

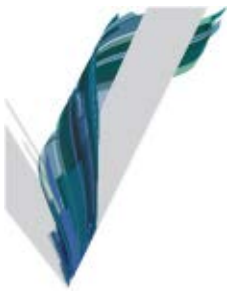
both charitable organizations and professional fundraisers. The single portal is expected to create efficiencies in the filing process and reduce administrative costs for charitable organizations and professional fundraisers, increase transparency by making registration and financial information available to the general public, and enable information-sharing among state regulators, academics, and policymakers. There are 13 pilot states participating in the initial development of the single portal platform. In early 2016, MRFP published a Request for Information for input on the single portal and received constructive feedback. MRFP has invited grant proposals and is currently searching for a vendor to build and launch the single portal platform. MRFP expects to launch the platform among the 13 pilot states in the near future.

- Citizenaudit.org is a newer online platform that enables users to learn about a nonprofit organization by running keyword searches that result in the development of an in-depth nonprofit profile based on information from the organization's IRS Forms 990 dating back 15 years. This platform also provides the ability to map and visualize connections between a nonprofit organization and its board members, officers, and key employees, with other nonprofit organizations. It is a useful tool for academics, charity watchdog groups, and anyone interested in analyzing large numbers of nonprofit organizations, or for an individual or corporation conducting due diligence prior to donating to or partnering with a particular nonprofit organization.

Enforcement Trends Following the Cancer Fund of America Multi-State Litigation

In May 2015, the Federal Trade Commission (FTC) and state charity regulators from all 50 states and the District of Columbia filed a historic civil suit against four alleged sham cancer charities—Cancer Fund of America (CFA), Cancer Support Services (CSS), Children's Cancer Fund of America (CCFA), and The Breast Cancer Society (TBCS)—and several of their executives, asserting that the charities engaged in deceptive charitable solicitation practices by making false and misleading claims in their appeals to donors. This was the largest joint action ever taken by the FTC and state charity regulators. CCFA, TBCS, and their respective principals reached an agreement with the plaintiffs at the time the complaint was filed. CFA and CSS later agreed to a \$75.8 million judgment and to dissolve the organizations in March 2016.

The successful collaboration between the FTC and state charity regulators sent a clear message that both federal and state regulators will not tolerate deceptive fundraising practices. Moreover, charitable organizations that utilize gift-in-kind (GIK) programs should make sure that their valuation and ownership transfer of donated goods is proper and well documented, because such practices were at the center of the multi-state investigation. During the public session, regulators acknowledged that by working together, they were able to leverage resources and achieve an outcome that a single agency or regulator would not have been able to pursue on its own. Federal and state regulators are communicating more, sharing information with each other, and using technology to work together more efficiently and effectively. This means that, undoubtedly, there will be more multi-state cooperation among federal and state regulators to tackle perceived bad actors.



Overview of State Regulation of Charitable Organizations

November 2016

State Registration

Currently 39 states, the District of Columbia, and other cities require most charities to register. (Some other states have a narrower definition of charities they require to register.) Notably, even if a state does not require registration, each attorney general is endowed with the authority to investigate a charity in the public's interest, to ensure that funds entrusted to the charity are managed and used for charitable purposes.

- Triggering definition for registration – Generally triggered by “solicitation” – affirmative act of asking for a gift or “contribution” or selling goods/services that will benefit a charitable cause.
 - Broad – “by any means”
 - May include grant solicitation
- Typical exemptions
 - Religious organizations
 - Organizations that do not raise more than a specified amount from public (all states) if fundraising is conducted by volunteers
 - Organization soliciting only within membership
 - Hospitals
 - Named individual
 - Sometimes universities or federally chartered charities
- Common requirements for charities
 - Registration and renewal, some states using a Unified Registration Statement
 - Disclosures when soliciting (e.g., identification of state office where financial reports are filed)
 - Annual financial reporting
 - Notification of professional fundraiser, professional fundraising consultant, or commercial co-venture relationships

Charitable Solicitation Notices

Eleven state laws require that charities provide solicitation notices on their websites and printed materials that have information about how to review the charity's financials or state registration or both. The state-required notice typically dictates the size and specific language.

Internet Solicitations – Charleston Principles

Set of voluntary principles (except in Tennessee and Colorado) drafted by the National Association of State Charity Officials (NASCO) that informs charities on the expectations of regulators.

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

(1) specifically targets those within that state OR

(2) receives contributions from the state on a repeated and ongoing basis or a substantial basis through their website

State Regulation – Professional Solicitor/Professional Fundraising Consultant

State laws generally regulate for-profit entities acting at the behest of charities. About 41 states require registration and have other requirements.

- 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, but does not directly solicit or hold funds
- Examples of requirements:
 - Registration
 - Bond
 - Filing of Contracts
 - Disclosures
 - Approval of script or solicitation language by the state
 - Listing of contracts on the charity's annual registration
- Often **mandatory** contractual provisions
 - 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** – may not be allowable.

Note: The IRS also requires disclosures regarding paid fundraisers and counsel on the Form 990.

Commercial Co-Venture (CCV)

A CCV is 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.

- 26 states have laws that specifically regulate CCVs

Current Registration States

- Alabama (**bond** and registration)
- California (unless certain requirements met)
- Illinois (as a charitable trust)
- Massachusetts (**bond** and Forms 10 and 10B)
- South Carolina (registration and Notice of Solicitation forms)

Current Notification States

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

An example of required the disclosures for a CCV showing the time frame, the amount per sale and the maximum royalty payment (which is often characterized as a gift but is not a charitable donation):

"Every time you buy a bottle of ECO between June 1 and December 31, 2016, 5 cents will be given to the Earth Foundation, up to a maximum of \$25,000."

Charities are frequently required to list CCV agreements on their own annual charitable registrations.

AUTHORS

Jonathan L. Pompan
Jeffrey S. Tenenbaum

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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

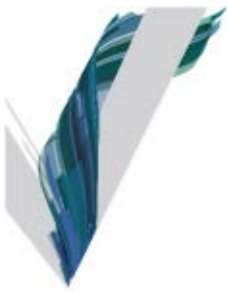
and charities conducting cause-marketing campaigns, but provide additional specific and concrete examples of disclosures to consider. A decision to disregard these standards could lead to a greater risk of investigation and enforcement. For companies considering cause-marketing campaigns, the new breadth 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.

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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”](#)**

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.”



Additional Background Materials and References

[State Regulation and Enforcement in the Charitable Sector](#), a research report from Columbia University and Urban Institute's Center on Nonprofits and Philanthropy (September 2016).

[Federal Trade Commission and various states' cases against Cancer Fund of America, Inc., Cancer Support Services, Inc., Children's Cancer Fund of America, Inc., and The Breast Cancer Society, Inc.](#)

Stipulated judgment: [Federal Trade Commission v. Marleau et al.](#), Civ. No. C09-5289BHS (W.D. Wash. 2009).

Stipulated judgement: [Bennett v. Community Support, Inc.](#), Civ. No. 09-1-1145-05 (Hawaii 2009).

[Schedule M "Noncash Contributions," Form 990](#), Internal Revenue Service (2015).

[Schedule G "Supplemental Information Regarding Fundraising or Gaming Activities," Form 990](#), Internal Revenue Service; [Schedule G Instructions](#)

["The Charleston Principles: Guidelines on Charitable Solicitations Using the Internet,"](#) adopted by NASCO March 2001.

Presentation: ["Nonprofit Fundraising and Revenue Generation through a Legal Lens: Everything Non-Attorneys Need to Know"](#) by Venable LLP's Jeffrey S. Tenenbaum and Anita Drummond (August 15, 2016) at American Society of Association Executives

State of New York Attorney General, ["Right from the Start: Responsibilities of Directors of Not-For-Profit Corporations,"](#) May 15, 201.

State of New York Attorney General, ["Before You Hire a Fundraiser"](#)

[IRS Form 990 Data Machine Readable Project through Amazon Web Services](#)

[New York Attorney General's Five Best Practices for Transparent Cause Marketing](#) (2012).