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# Government Investigations and Controversies

*Key Legal and Communications Strategies for  
Nonprofits to Prepare for and  
Manage the Crisis*

Wednesday, April 26, 2017, 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

**Erik Jones, Esq.**

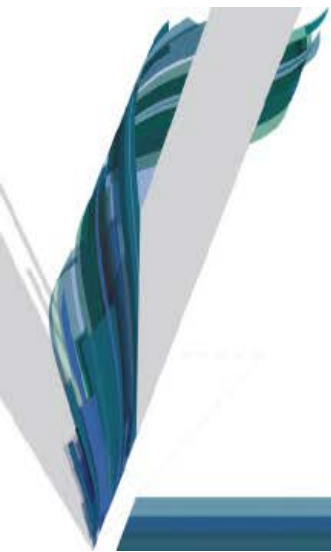
Partner, Investigations Practice, Venable LLP

**Alexandra Megaris, Esq.**

Counsel, Investigations Practice, Venable LLP

**Tracy Schmalzer**

Managing Director, Crisis Communications,  
Litigation, and Issues Management Practices, Kivvit



# Presentation



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- **May 18, 2017:** [Moving Money Overseas and Back: What Every Nonprofit Operating Internationally Needs to Know](#)
- **June 13, 2017:** [An Independent Contractor, an Employee, and Their Attorney Walk into a Bar: Why This Is No Joke for a Nonprofit](#)



## Topics We Will Cover

- The government agencies with enforcement and investigative authority relevant to nonprofit organizations
- Anatomy of a government investigation
- Strategies for navigating the process and mitigating fallout
- Why a crisis communications plan?
- Guiding principles – the do's and don'ts of communicating
- Principles of issue management/crisis response
- Investments in compliance to avoid investigations
- Learning from a crisis

Home » News & Events » Press Releases » FTC, States Settle Claims Against Two Entities Claiming to Be Cancer Charities; C Ban Leader from Working for Non-Profits

## FTC, States Settle Claims Against Two Entities Claiming to Be Cancer Charities; Orders Require Entities to Be Dissolved and Ban Leader from Working for Non-Profits

**Concludes Action by FTC, All 50 States and D.C. Against Charities That Bilked More Than \$75 Million from Donors**

**FOR RELEASE**

March 30, 2016

**TAGS:** deceptive/misleading conduct | Bureau of Consumer Protection | Northwest Region | Consumer Protection | Telemarketing | Charity

Two nationwide organizations purporting to be cancer charities will be dissolved, and their president is banned from profiting from any charity fundraising in the future, under a settlement with the Federal Trade Commission, all 50 states and the District of Columbia.

N.Y. / REGION

## Ethics Panel Investigating de Blasio's Nonprofit Is Said to Issue Broad Subpoena

By WILLIAM K. RABINOVICH OCT. 5, 2016

U.S. • Crime • Justice • Energy • Environment • Extreme Weather • Space • Science

Live TV U.S.

## Lawmakers to investigate disabled veterans charity

By David Fitzpatrick and Drew Griffin, CNN Special Investigations Unit  
Updated 8:51 AM ET, Wed July 25, 2012

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SHARE

Human fetal kidney cells were used to develop Genentech's Patisiran, which helps clear thick mucus from the lungs of children with cystic fibrosis. © 2017 Getty Images/Photo

## Fact-checking Congress's fetal tissue report

By Meredith Wadman | Jan 5, 2017, 6:00 PM

The House of Representatives Select Investigative Panel investigating the procurement of fetal tissue for research has distanced, but not before recommending that the National Institutes of Health be required to stop funding fetal tissue research, and that the huge health provider Planned Parenthood be stripped of U.S. funding. On the heels of the panel's call, House

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## Know Your Regulator(s) and Regulatory/ Political Climate







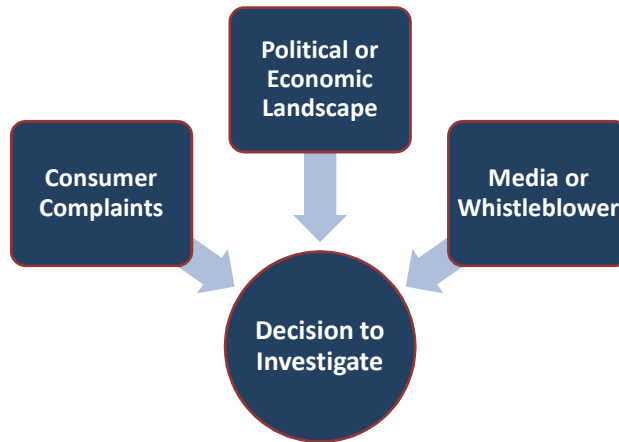


Committee on Finance

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# Launch of an Investigation



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# Two Possible Paths: Public or Non-Public



**United States Senate**  
Washington, DC 20540-5000

May 6, 2017

President and Chief Executive Officer  
[Redacted]  
[Redacted]  
[Redacted]  
[Redacted]

Dear Mr. [Redacted]:

As Chairman and a senior member of the Senate Finance Committee, we have a responsibility to the more than 100 million Americans who receive health care under Medicare, Medicaid, and CHIP. As part of that responsibility, the Committee has investigated the troubling practices of pharmaceutical and medical device companies, as well as their relationships with physicians and non-profit medical organizations.

It is clear that the United States is suffering from an epidemic of avoidable deaths and suffering resulting from the treatment of and not of preventable medical conditions. According to 2015 data, "more than 400,000" of the "70,000 drug prescribing deaths in 2015" were related to opioid-based prescription medications.<sup>1</sup> Deaths from these drugs rose more rapidly: "from about 10,000 in 1999 to 19,000 in 2014. Some say other causes of drugs, killing more people than forests and cancer combined." Other people in the United States were the more danger than the medicines as a result of their own physicians.<sup>2</sup> Additionally, the 2015 report that improper "use of prescription painkillers costs health insurers up to \$73.5 billion annually in direct health care costs."<sup>3</sup>

In addition, prescription drug prices in the United States are the highest in the world, as an "avoidable epidemic" killing at least 100 people per year and contributing to increases in health care costs.<sup>4</sup> "Prescription drugs in the United States, from 2000, 400% more than in 2000, 40% more than in 2000." <sup>5</sup> <http://www.fda.gov/oc/2017/05/06/avoidable-deaths-and-suffering>

<sup>1</sup> 2015 Prescription Drug Use and Expenditure Report, November 1, 2016, at <http://www.fda.gov/oc/2017/05/06/avoidable-deaths-and-suffering>

<sup>2</sup> See, e.g., <http://www.fda.gov/oc/2017/05/06/avoidable-deaths-and-suffering>

<sup>3</sup> See, e.g., <http://www.fda.gov/oc/2017/05/06/avoidable-deaths-and-suffering>

<sup>4</sup> See, e.g., <http://www.fda.gov/oc/2017/05/06/avoidable-deaths-and-suffering>

<sup>5</sup> See, e.g., <http://www.fda.gov/oc/2017/05/06/avoidable-deaths-and-suffering>

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## Why a Communications Plan?

An integrated strategy is necessary to successfully balance conflicting pressures and process.

LEGAL / REGULATORY PROCESS	MEDIA/ PUBLIC PRESSURES
Process of investigation and litigation unfolds over an extended period of time	Immediate need to set strategic narrative and control messages to internal and external audiences
Dense, legalistic filings and arguments	Concise and clear messages
Saying anything can be harmful	Saying nothing can be harmful
Presumption of innocence	Presumption of guilt



## Responding in a Crisis – The Do's

- **Provide Realistic Expectations:** Demystify the process by setting clear parameters around ability to respond and availability of appropriate spokespeople, so that when they don't get you on the first try, they won't be surprised.
- **Create Clear Lines of Communication and Decision Making:** Time is critical in these situations – you can't afford to lose any of it trying to navigate the internal org chart. Lay out the approval process early with the appropriate team members and make sure they know these matters take priority.
- **Keep It Simple and Direct:** Exercising message discipline is critical to getting through the media static. Don't confuse or distort statements by trying to force in messages other than the one at hand (i.e., mission statements, defensive language, etc.). It appears evasive and disorganized – and muddles the message.
- **Disagree When Warranted:** Refuting false claims and narratives as early as possible is critical to controlling coverage and public perception. Do not argue – kill with facts.
- **Use Third Parties to Your Advantage:** Sometimes using outside experts, like-minded organizations or other interested parties can help carry your message more effectively than if you had delivered it yourself. Using surrogates to convey messages or provide background can help steer a story line in a credible and affirmative way.




## Responding in a Crisis – The Don'ts

- **Don't hide.** Be accessible. Provide some point of access, to the extent possible. Be part of the conversation, so you know where it's going. Always respond, even if on background.
- **Don't speculate – and don't lie.** Stick to what is objectively known and verifiable. Be factual.
- **Don't disperse – coordination is key.** All media contacts should go through one person or a small group of persons. Members of the organization must be told to refer all inquiries to that person or group, so that a log can be kept and the message controlled.
- **Don't be cold.** Public statements and messages should contain emotion, if appropriate. Seeming cold and legalistic can be more harmful than the news of an investigation.
- **Don't fall behind.** Whenever possible, get ahead of the story with your messages or with surrogates.



## Steps to Take in Response to an Investigation

- 
- Receipt of CID, civil subpoena, or requests for information
  - Evaluate source of requests
  - Assess scope
  - Determine legal posture — voluntary or compulsory
  - Weigh options

- Engaging with staff to limit burden and understand basis for investigation

- Record hold
- ESI considerations
- Collection, review, and production of documents





## Step 1: Review CID/Subpoena/Letter

- A review of the requests will identify:
  - The purpose of the investigation
  - The assigned staff enforcement attorneys
  - The production deadline (e.g., 30 days from issuance)
  - The definitions
  - The instructions
  - Interrogatory and document requests



## Step 2: Establish a Response Team

- Notify board and management and necessary IT and operations subject matter experts
- Engage counsel and public relations professionals
- Organize **core team**: Assign roles and set up a clear decision-making process
- Take proper steps to preserve responsive materials (e.g., implementation of a document preservation policy)
- Consider collateral consequences such as required public disclosure or notification of counterparties/sources of funding
- Set up monitoring (social and traditional media)



## Guiding Principles of Crisis Management

- Clear lines of communication and decision making
- Message discipline
- Real-time monitoring and response
- Proportionality
- Know your audiences
- Reputation



## Step 3: Determine Response Strategy and Potential Needs for Modification

- What is scope of agency's/body's authority in issuing the request?  
Has it overstepped the bounds of its authority?
- Does request seek potentially privileged materials? Confidential materials of third parties?
- Does request present technological obstacles and burdens?
- What modifications can be made to reasonably reduce burden in a way that does not impede agency's investigation?
- What is a realistic amount of time needed to collect and produce materials?



## Step 4: Confer with Staff Investigators

- Be prepared, flexible, and knowledgeable
- Try to extract as much information about the investigation as possible, including who the target is, how it was initiated, and where it is headed
- Present detailed explanations of technical or other burdens of specific requests and propose alternatives
- Flag potential issues of confidentiality and privilege
- Negotiate in good faith
- Request confidentiality over submissions and discuss FOIA

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## Step 5: Respond to Request in Accordance with Strategy and Negotiated Modifications

- Collection of documents:
  - The identification, collection, review, and processing of electronically stored information, such as emails, poses certain challenges for most organizations
  - Using vendor or law firm's in-house IT resources
  - Specifications set forth in CIDs/subpoenas typically include detailed instructions
  - Privilege and confidentiality considerations
  - Understand what you are producing before submitting!
- Appropriate objections and qualifications
- Consider pros and cons of providing additional information and context above and beyond what was requested

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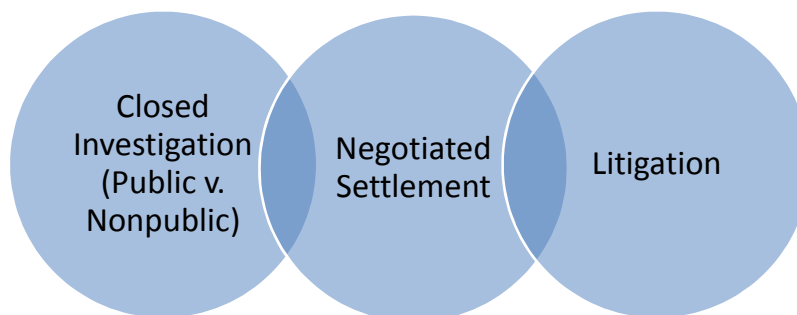


## Step 6: Consider Appropriate Follow-up

- Internally focused:
  - Assessment of legal/compliance risks and implementation of necessary corrective action
  - Potential need to coordinate with other investigations or litigation
- Agency-facing advocacy:
  - Tell your story through white papers and presentations/in-person meetings
- Public-facing:
  - Develop proactive and reactive strategies for dealing with reputational and public relations risk
  - Deploy messaging materials for identified audiences (media, employees, other regulators)



## How Does a Government Investigation Typically Resolve Itself?



## Preparing the Defense



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## Investing in Compliance to Avoid Investigations and Maximize Outcome



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## Learning from Crisis

- After the crisis passes, it is important to analyze the response to identify lessons learned that can be applied to future planning. An **after-action report** should be created as soon as possible after the event itself while everyone's memories are still fresh. It should include a discussion and address:
  - ✓ What was our plan and what were our goals?
  - ✓ Who were the audiences?
  - ✓ What was the timeline?
  - ✓ Who was involved?
  - ✓ What outcomes and outputs were intended?
  - ✓ What products were to be produced?
- What went well?  
*Example: Were you able to effectively control or regain control of the narrative?*
- What did not go well? Why?  
*Example: Were you too slow to send out a public statement?*  
*Example: Did you fail to update a key stakeholder?*
- What should you do differently next time?



## Questions?

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To view an index of Venable's articles and presentations or upcoming programs on nonprofit legal topics, see [www.Venable.com/nonprofits/publications](http://www.Venable.com/nonprofits/publications)  
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or [www.Venable.com/nonprofits/recordings](http://www.Venable.com/nonprofits/recordings).

To view Venable's Government Grants Resource Library, see [www.grantslibrary.com](http://www.grantslibrary.com).

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and relevant nonprofit news and commentary.



# Speaker Biographies

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## Jeffrey S. Tenenbaum

Partner

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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

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 five years (2012-16). 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.

### ACTIVITIES

Mr. Tenenbaum is an active participant in the nonprofit community who currently serves on the Editorial Board of *The NonProfit Times*, 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.



## MEMBERSHIPS

American Society of Association  
Executives

## 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 Marriage and Family Therapy  
American Association for the Advancement of Science  
American Bar Association  
American Cancer Society  
American College of Cardiology  
American College of Radiology  
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  
American Thyroid Association  
America's Health Insurance Plans  
Anti-Defamation League  
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  
Auto Care Association  
Better Business Bureau Institute for Marketplace Trust  
Biotechnology Innovation Organization  
Brookings Institution  
Carbon War Room  
Career Education Colleges and Universities  
Catholic Relief Services  
CFA Institute  
The College Board  
CompTIA  
Council on Foundations  
CropLife America  
Cruise Lines International Association  
Cystic Fibrosis Foundation  
Democratic Attorneys General Association  
Dempsey Centers for Quality Cancer Care  
Design-Build Institute of America  
Entertainment Industry Foundation  
Entertainment Software Association  
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  
Homeownership Preservation Foundation  
Hugh Jackman Foundation  
Human Rights Campaign  
Independent Insurance Agents and Brokers of America  
InsideNGO  
Institute of Management Accountants  
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 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  
Pact  
Patient-Centered Outcomes Research 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, 2012-16

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

## 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 1,000 articles.

## SPEAKING ENGAGEMENTS

Mr. Tenenbaum is a frequent lecturer on nonprofit legal topics, having delivered over 850 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*, *Politico*, *Bloomberg Business*, *Bloomberg BNA*, *EO Tax Journal*, and other periodicals. He also has been interviewed on nonprofit legal topics on Washington, DC CBS-TV affiliate, the Washington, DC Fox-TV affiliate's morning new program, Voice of America Business Radio, Nonprofit Spark Radio, The Inner Loop Radio, and Through the Noise podcasts.



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Investigative Counsel, United  
States Senate Committee on  
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Counsel, United States House  
Energy and Commerce Committee  
Counsel, United States House  
Oversight and Government Reform  
Committee

Erik Jones is a partner in Venable's Washington, DC office, where he helps lead the firm's Congressional Investigations practice and works closely with the State Attorneys General and E-Commerce, Privacy and Data Security practices. He has significant investigatory and policy experience in state and federal government, as well as the private sector.

Prior to joining Venable, Mr. Jones served as an Assistant Attorney General and Director of the Policy Bureau for the Office of Illinois Attorney General Lisa Madigan. In this position, he was responsible for developing and managing the office's agenda through legislation, investigations, and outreach initiatives. Among his responsibilities, Mr. Jones served as the Attorney General's lead advisor on data security and privacy.

Previously, Mr. Jones was Deputy General Counsel and Chief Investigative Counsel to the U.S. Senate Committee on Commerce under Sen. Jay Rockefeller, where he helped create the Committee's Office of Oversight and Investigations and later served as its lead counsel on cybersecurity matters. Prior to his work in the Senate, Mr. Jones was Counsel to the House Committee on Energy & Commerce and Oversight & Government Reform, chaired by Rep. Henry Waxman. During his time in Congress, he helped direct more than 30 investigations and hearings.

Mr. Jones led and worked on a diverse range of congressional investigations related to e-commerce practices, privacy, telecommunications, transportation, energy, space policy, environmental regulations, product safety, the financial sector, health care, and government contracting. Notably, he led the Commerce Committee's investigation of abusive billing practices on the Internet and used the findings of the investigation to draft the Restore Online Shoppers' Confidence Act (ROSCA), signed into law by President Obama in 2010. While serving as counsel to the House Oversight Committee, he led the investigation that uncovered high levels of formaldehyde in trailers that the Federal Emergency Management Agency supplied to victims of Hurricane Katrina.

Mr. Jones has been especially active at the intersection of law and technology. He played a major role in congressional work on data security and technology issues, taking the lead in drafting and negotiating significant portions of the Cybersecurity Act. He led the Commerce Committee's survey of cybersecurity practices among Fortune 500 companies and helped push for the establishment of the NIST Cybersecurity Framework, the public-private partnership for developing cybersecurity standards. He also directed the first federal investigation into the privacy practices of data brokers and managed the Committee's Internet governance portfolio, which included ICANN's decision to expand top-level domain names.

While working in the Illinois AG's office, he helped develop and implement a plan to respond to the wave of data breaches affecting consumers. He was the primary staff attorney working with the AG who drafted and negotiated the first significant update to Illinois law on data security. He also directed efforts to educate Illinois businesses

## BAR ADMISSIONS

Illinois

District of Columbia

## EDUCATION

J.D., University of Michigan Law School, 2004

Associate Editor, *Michigan Journal of Law Reform*

B.S., *magna cum laude*, Southern Illinois University Edwardsville, 2001

## MEMBERSHIPS

International Association of Privacy Professionals

American Council of Young Political Leaders

and residents on data privacy and data security issues, and participated in numerous investigations of significant data breaches affecting Fortune 500 companies. During his time with the office, Mr. Jones also initiated and led the Attorney General's inquiry into the collection of consumer medical information by websites and apps, led a statewide investigation into employers' use of payroll cards, successfully drafted and negotiated a law to regulate payroll cards, and drafted and negotiated a law aimed at patent trolls.

Mr. Jones began his career in private practice at an international law firm, where he split his time between the white-collar criminal defense practice group and the e-commerce and privacy practice group.

## ACTIVITIES

- Adjunct Professor, Illinois Institute of Technology Chicago-Kent College of Law

## PUBLICATIONS

- August 2016, The Download - August 2016, The Download
- July 2016, The Download - July 2016, The Download
- June 2016, The Download - June 2016, The Download
- June 28, 2016, Keep Calm and Carry On: Data Protection Post Brexit, The Download
- May 2016, The Download - May 2016, The Download
- April 2016, The Download - April 2016, The Download
- March 2016, The Download - March 2016, The Download
- February 2016, The Download - February 2016, The Download
- January 2016, The Download - January 2016, The Download
- December 2015, The Download - December 2015, The Download
- December 10, 2015, A Breach Can Happen to You (or Already Has, and You Just Don't Know It Yet): How Nonprofits Can Best Manage Cybersecurity Risk
- November 2015, The Download - November 2015, The Download
- October 2015, The Download - October 2015, The Download

## SPEAKING ENGAGEMENTS

- April 26, 2017, Government Investigations and Controversies: Key Legal and Communications Strategies for Nonprofits to Prepare for and Manage the Crisis
- November 15, 2016, "Privacy & Emerging Technology: Designing First-Ever Best Practices" at the Startup Policy Lab
- April 28, 2016, Venable Lunch & Learn "Investigations, Regulation, and Legislation: How State AGs and Washington are Responding to Technology That's Changing the Way We Live and Work"
- April 6, 2016, "Privacy and Data Security Trends in the States" at the International Association of Privacy Professionals (IAPP) Global Privacy Summit 2016
- March 11, 2016, "State Enforcement and the Dietary Supplement Industry: What You Need to Know" at the Natural Products Expo West/Engredea Conference
- February 23, 2016, "Policy, Politics, and Consumer Trust in Digital Marketing" at the RampUp! 2016 Conference
- December 10, 2015, A Breach Can Happen to You (or Already Has, and You Just Don't Know It Yet): How Nonprofits Can Best Manage Cybersecurity Risk
- September 29, 2015, "The Cybersecurity Threat - What You Can't See *Can* Hurt You" at a M&T Bank, Wilmington Trust and Venable LLP Thought Leadership Breakfast
- March - April 2015, Witness at legislative hearings on data security before the Judiciary Committees for the Illinois Senate and House of Representatives
- July 2014, Witness at a hearing, "Data Security and Identity Theft" before the Finance Committee of the Chicago City Council

- June 2014, Speaker on a panel on patent trolls at the Association of Corporate Patent Counsel's summer meeting
- April 2014, Speaker on a panel, "Challenges in Assessing Medical Apps" at Chicago-Kent College of Law's conference on Medical Apps, Privacy, and Liability
- March 2014, Witness at legislative hearings on patent trolls before the Judiciary Committees for the Illinois Senate and House of Representatives
- March 2014, Speaker on a panel, "Regulation of Data Security" at Loyola University Chicago Consumer Law Review's Symposium on Consumer Privacy and Data Collection
- September 2013, Speaker on panel, "Framing Big Data and Privacy" at a conference cohosted by the Future of Privacy Forum and the Stanford Center for Internet and Society
- March 2013, Speaker on a panel, "The Data-Driven Way of Life: Threats and Solutions" at the Direct Marketing Association's "DMA in DC 2013" Program
- February 2013, Speaker on a panel, "Cyber Warriors: What do they do and how do we get more of them?" at the TechVoice DC Fly-In hosted by CompTIA
- January 2013, Speaker in a breakout session on "Plumbing the Policy Implications of Data Analytics and Defining 'Big Data,' the Year's Most Overused Term" for the State of the Net Conference hosted by the Congressional Internet Caucus Advisory Committee
- February 2012, Speaker in a webcast for Continuing Legal Education (CLE) credit on "Congressional Investigations 2012: How to Prepare for the Investigative Agenda in the New Year"
- May 2011, Featured speaker at the Federal Trade Commission's Forum on "Examining Telephone Bill Cramming" and spoke on a panel, "Potential Solutions to the Cramming Problem"
- October 2010, Guest lecturer for the University of California's Program "Law and Lawyering in the Nation's Capital" and jointly led a lecture on "Investigations by the Federal Government: Perspectives from the Executive Branch and Congress"





## Alexandra Megaris

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### AREAS OF PRACTICE

Advertising and Marketing  
Legislative and Government Affairs  
Political Law  
Congressional Investigations  
Communications  
Postal Law  
Regulatory

### INDUSTRIES

Credit Counseling and Debt Services  
Nonprofit Organizations  
Consumer Financial Services

### BLOG

Political Law Briefing

### BAR ADMISSIONS

New York  
District of Columbia  
New Jersey

### COURT ADMISSIONS

U.S. Supreme Court

Alexandra Megaris advises companies on regulatory investigations and government enforcement matters, with a focus on consumer protection, consumer finance, and advertising issues. Ms. Megaris has extensive experience across a broad array of regulatory matters, including managing large-scale investigations before the Consumer Financial Protection Bureau, the Federal Trade Commission, state Attorneys General offices, the U.S. Postal Service, and the U.S. Congress.

Ms. Megaris counsels clients on regulatory implications of potential transactions and business activities and on compliance with all aspects of consumer protection laws, including the Consumer Financial Protection Act, FTC Act, Fair Debt Collection Practices Act, Fair Credit Reporting Act, the FTC's Telemarketing Sales Rule, and state and federal unfair, deceptive and abusive practices (UDAAP) laws. She also works with banks and nonbanks alike to prepare for and navigate supervision examinations by the CFPB and other regulators, including advising companies on building and enhancing compliance management systems.

### ACTIVITIES

- Ms. Megaris was appointed as a Young Lawyer Liaison to the ABA Consumer Financial Services Committee subcommittee on Debt Collection Practices and Bankruptcy. The subcommittee focuses on consumer debt collection practices and the aspects of bankruptcy that affect consumer financial services. Ms. Megaris' appointment runs through fall 2019.
- Ms. Megaris has a dedicated *pro bono* practice. She recently won a provisional grant of asylum for a client fleeing Chinese persecution in Tibet. The three-year struggle included numerous logistical challenges and culminated with Ms. Megaris's direct examination of the client.
- While in law school, Ms. Megaris interned for the Honorable Loretta A. Preska of the United States District Court for the Southern District of New York and for the United States Attorney's Office for the Eastern District of New York.

### PUBLICATIONS

- April 2017, Criminal charges brought against telemarketers, FTC confirms interest in lead generation, and more in this issue of *Lead Generation Digest*
- March 30, 2017, FTC requirements for debt collectors, credit reporting of public records data, and more in this issue of *Consumer Financial Services Practice Digest*
- March 30, 2017, Making a bad situation worse, a rude awakening for companies with advertising injury coverage, and more in this issue of *Advertising Law News & Analysis*

## EDUCATION

J.D., Fordham University School of Law, 2008

B.A., University of Pennsylvania, 2005

- March 29, 2017, FTC Requires Substantiation to Support Debt Collection Communications
- March 23, 2017, Big Changes on Horizon for Credit Reporting of Public Records Data
- March 23, 2017, The Internet's most objectionable ad experiences, DMCA safe harbors, and more in this issue of *Advertising Law News & Analysis*
- February 17, 2017, D.C. Circuit to Review *PHH* En Banc, *Consumer Financial Services Practice Digest*
- February 3, 2017, Consumer Financial Services Practice Digest - February 3, 2017
- February 3, 2017, Uncertain Future? Parties Intervene in *PHH Corp. v. CFPB*
- January 26, 2017, Navigating the New Federal & State Debt Collection Enforcement Landscape
- January 24, 2017, Consumer Financial Services 2017 Outlook: Post-Inauguration Day Insights
- January 19, 2017, Consumer Financial Services Digest - January 19, 2017, Consumer Financial Services Alert
- December 22, 2016, Expectations for Incentive Compensation Programs by Consumer Financial Services Companies
- December 2, 2016, Consumer Financial Services Digest - December 2, 2016
- November 2, 2016, The Future of Online Advertising and Marketing for Consumer and Business Lending
- October 2016, Revisions to the MLA Examination Procedures Manual, updates to CFPB service provider guidance, and more in this issue of CFPB Digest
- October 27, 2016, CFPB Supervision and Enforcement: Thinking About Overlap
- September 21, 2016, A Look Inside the Official CFPB *Enforcement Policies and Procedures Manual*, CFPB
- September 16, 2016, CFPB Victory in CashCall Case – Owner Found Personally Liable, CFPB
- August 29, 2016, Surviving a CFPB exam, *Banking Exchange*
- August 5, 2016, Upcoming CFPB comment period deadlines, proposed updates to TRID rule, and more in this issue of CFPB Digest, CFPB
- June 17, 2016, CFPB Turns Five: The Evolving Legal and Regulatory Landscape for Debt Collection
- May 2016, Hidden conflicts in portfolio company cap structures, control and independence in minority investments, and more in the May 2016 edition of Fund Forum, Fund Forum
- May 5, 2016, Learning from self-regulatory programs, revisiting telemarketing record retention rules, and more in this edition of Advertising Law News & Analysis, Advertising Alert
- May 3, 2016, Education Lead Generation Targeted by FTC, Client Alert
- April 28, 2016, Can Banks Fight CFPB, *Banking Exchange*
- April 14, 2016, Enforcing your website terms, health app developers get a regulatory check-up, and more in this edition of Advertising Law News & Analysis, Advertising Alert
- April 14, 2016, FinTech and Marketplace Lenders Under Scrutiny, CFPB
- March 22, 2016, CFPB Enforcement Settlement Principles Revealed
- March 17, 2016, Beware The Govt's Squeeze On Lead Generation Marketing, *Law360*
- March 17, 2016, Lord & Taylor's native advertising troubles, an expensive reminder to review marketing practices, and more in this issue of Advertising Law News & Analysis, Advertising Alert
- March 14, 2016, Government Puts Squeeze on Lead Generation Marketing
- February 4, 2016, CFPB Warns Data Furnishers on Reasonableness of Written Policies and Procedures: First Compliance Bulletin of the Year, CFPB



## SPEAKING ENGAGEMENTS

- July 17, 2017, "Regulatory Compliance in an Evolving Legal Landscape," ACA International 2017 Convention and Expo
- June 7, 2017, "What's Changing in the Regulatory Environment? Hear From Your Federal and State Regulators," COMPLY2017, The RegTech and Compliance Conference
- April 26, 2017, Government Investigations and Controversies: Key Legal and Communications Strategies for Nonprofits to Prepare for and Manage the Crisis
- February 7, 2017, "Navigating Debt Buying in A 'Regulatory by Enforcement' Environment During a Rulemaking" at the 2017 DBA International Annual Conference
- January 26, 2017, "Navigating the New Federal & State Debt Collection Enforcement Landscape," an ACA International-hosted webinar
- January 24, 2017, "Consumer Financial Services 2017 Outlook: Post-Inauguration Day Insights," a Venable Webinar and CLE Session
- December 9, 2016, The Present and Future Role of State Attorneys General in Consumer Financial Services Regulation and Enforcement
- November 11, 2016, "Enhancing a Compliance Management System In the Real World" at the 2016 ACA International Fall Forum & Expo
- October 27, 2016, CFPB Supervision and Enforcement: Thinking About Overlap
- October 6, 2016, "The Future of Online Advertising and Marketing for Consumer and Business Lending" at the Lend360 conference
- June 17, 2016, "CFPB Turns Five: The Evolving Legal and Regulatory Landscape for Debt Collection" at the 2016 ACA International Convention & Expo
- March 17, 2016, "Navigating Consumer Protection, Complaints and Regulatory Oversight" at LeadsCon Las Vegas
- January 12, 2016, "Consumer Financial Protection Bureau 2016 Outlook," a Venable Webinar and CLE session
- November 18, 2015, "Minimizing Legal and Compliance Risk for Credit Furnishers," a Venable-hosted Webinar
- August 11, 2015, "Consumer Financial Protection Bureau Developments (July 2015)" for the ABA Antitrust Section Consumer Protection Monthly Update
- July 20, 2015, "Navigating CFPB Debt Collection Investigations and Enforcement Actions" at the 2015 ACA International Convention & Expo
- April 29, 2015, An Advertising Law Symposium Hosted by Venable LLP
- February 4, 2015, "Consumer Debt Buying and UDAAP: Point/Counterpoint" for the 18th Annual DBA International Conference
- January 8, 2015, "Consumer Financial Protection Bureau 2015 Outlook," a Venable CFPB Webinar
- December 16, 2014, "CFPB Update: Regulatory and Enforcement Developments," a CLE webinar for the American Law Institute
- November 7, 2014, "How CFPB Supervision and Exams Impact Compliance" at ACA International's 2014 Fall Forum & Expo
- September 10, 2014, "CFPB Turns Three: Three Years, Big Impact" for West LegalEdCenter
- August 14, 2014, "Staying Current with Consumer Protection: Practical Lessons from Recent Enforcement Actions" at LeadsCon New York
- July 21, 2014, "The CFPB at Year Three: A Look Back, and a Look Forward," Venable CFPB Webinar
- June 10, 2014, Legal Quick Hit: "Developing Your Government Investigations Playbook: What Your Nonprofit Should Be Doing Now to Prepare for the Future" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- April 24, 2014, "Navigating CFPB, FTC, and State Attorneys General Consumer Protection Investigations" for LeadsCouncil



## Tracy Schmalzer

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A seasoned communications strategist with over two decades of experience working at the intersection of politics, law, and journalism, Tracy leads the Kivvit's Crisis Communications, Litigation, and Issues Management practices.

Prior to joining Kivvit, Tracy managed the Office of Public Affairs at the Department of Justice and served as a senior advisor to Attorney General Eric Holder. While there, she was responsible for the Department's media strategy on high-profile law enforcement, policy and legislative issues, congressional investigations, and hearings, as well as significant criminal, civil, and antitrust litigation.

Previously, Tracy oversaw global public affairs for Yahoo! Inc., where she advised the CEO and executive leadership team on communications strategy involving policy and regulatory issues such as Internet privacy, intellectual property, and corporate social responsibility efforts in emerging markets. She also served on the company's crisis communications team managing priority matters including M&A issues. Tracy also worked for the Senate Judiciary Committee, where she served as the communications director for the committee and its chairman, Senator Patrick Leahy (D-VT).

Tracy began her career as a journalist in New England where she covered state and national politics. She is a contributor to *Huffington Post* and *American Lawyer*. She lives in Washington, D.C.



# Additional Information



## AUTHORS

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Jeffrey S. Tenenbaum

## RELATED INDUSTRIES

Nonprofit Organizations

## ARCHIVES

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## ARTICLES

November 29, 2016

### IT'S NEVER TOO LATE: ENHANCING CHARITY FUNDRAISING TRANSPARENCY AND LEGAL COMPLIANCE AT YEAR-END

As Giving Tuesday launches across the United States today, public charities are making a final push to meet their year-end fundraising goals. Whether a charity is using traditional or innovative fundraising tools (or both), transparency and legal compliance should be the hallmarks of any solicitation campaign.

Charitable fundraising must comply with both charitable solicitation and consumer protection laws. If a charity has not laid out a structured approach to fundraising compliance, it risks attracting scrutiny from state and federal regulators, who are increasingly collaborating on enforcement, as discussed at [Venable's November 10, 2016 program](#). There is no time like the present: now is the time to plan for compliance.

#### Transparency in Solicitations

A strong multi-state and Federal Trade Commission (FTC) collaboration continues to emerge – the FTC and the National Association of State Charities Officials (NASCO) have announced plans to co-host a [conference next March](#) with a focus on "how consumers evaluate and respond to various charitable solicitation practices and the role for consumer protection." While this conference will undoubtedly provide useful guidance to the industry in the near future, charities can take steps today to enhance the transparency of their solicitations:

- Evaluate solicitations in all platforms across the organization, including mail, website, emails, scripts, volunteer talking points, brochures, and reminder letters for accuracy and consistency;
- Ensure that truthful statements are made about the use of funds, including whether the funds are restricted or unrestricted, used in a particular location or for a particular purpose (e.g., nationwide or local community program), applied to the project promised, or limited to covering overhead costs;
- Accurately reflect any conditions for matching gifts in solicitations, and make clear if there is a cap on any matching program;
- Ensure that written and oral solicitations include disclosures that are required by state charitable solicitation laws as well as federal law (e.g., the FTC's Telemarketing Sales Rule);
- Provide complete information about the charity's name, physical location, and contact information; and
- Provide easy access to additional information about the charity, such as annual reports, board members, and financial information.

#### Regulatory Compliance

Regulators commonly advise donors to research any charity to which they are considering donating, and advise charities to perform due diligence on fundraisers with whom they may contract. Checking off the list of *all* applicable registration and reporting requirements goes a long way in protecting a charity's fundraising efforts. A charity should adhere to these baseline requirements:

- Engage leadership to emphasize to the organization's staff and volunteers the importance of full legal compliance;
- Confirm that a reliable system is in place to track fundraising expenses and donations and manage the contractors the charity uses to meet the charity's legal reporting requirements;

- Remember that even the passive solicitation of contributions (e.g., via the use of a "Donate Now" button on the organization's website) requires written disclosures under some states' laws;
- Confirm that state charitable registrations are current in the District of Columbia and all of the 39 states that require registration and reporting; include states where the charity is domiciled, donors are specifically targeted, or donations are received or solicited on a repeated or substantial basis;
- Confirm that federal tax acknowledgment letters are sent for contributions of \$250 or more, and for quid pro quo contributions of more than \$75; and
- Confirm that the IRS Form 990 information discloses the fundraising expenses of the charity, including the details required in **Schedule G** for fundraising events and fundraising professionals if reporting thresholds are met.

### **Donor Intent**

Well-functioning charities understand that donor relations are their lifeblood, and take special care to honor a donor's intent. Unfortunately, sometimes donors' intended use of their contribution becomes disconnected from the charity's actual application of the donated funds. While donors are often the party most likely to complain about the perceived misuse of their contribution, state attorneys general and the FTC are broadly empowered to protect consumers' interests. Most state attorneys general are specifically authorized to protect charitable assets. A charity should take the following steps to ensure that gifts received are used for the charitable purpose(s) that the donor intended:

- Confirm that donations are tracked and allocated to specific budgets that are aligned with the donor's intent;
- Adopt a process to evaluate and report on the use of funds—broadly to the public or to a donor specifically—in accordance with the stated intention in the solicitation;
- Confirm that conditions are met for any donor-matching program;
- Work with independent auditors to evaluate systemic compliance with donor intent;
- Review any promises made by the charity to protect donor "rights" to ensure that they are reasonable and do not endanger charitable assets—and then abide by them;
- Evaluate post-solicitation communications to ensure that they reflect donor intent and do not conflict with the original solicitation messages;
- Utilize well-drafted gift agreements where appropriate for larger gifts; and
- Establish a procedure for addressing donor complaints that is sensitive to donor relations while including appropriate measures to protect charitable assets in cases where a demand is made to return a gift.

### **Contractor Management**

Charities must be vigilant when contracting with other parties for fundraising services, such as professional fundraising firms, online "crowdfunding" platforms, and companies that act as commercial co-venturers by promoting the message that the sale of goods and services will benefit a charity or a charitable purpose. By controlling these activities, the charity is protecting itself, its mission, and its donors. Old and new forms of solicitations need equal attention. A charity can adopt the following safeguards to ensure sound management of its charitable assets:

- Conduct due diligence on contractors, including interviewing references, confirming state registration (where required), and reviewing public enforcement announcements issued by federal and state regulators;
- Comply with the charity's conflict of interest policy by vetting potential contractors against interested parties;
- Enter into strong written contracts that protect the charity's brand, messages, money, and termination rights and comply with all state law requirements;

- Require any subcontract to have flow-down obligations from the primary contract;
- Ensure that fundraising professionals engaged by the charity are registered as required by state law and that all reporting is monitored by the charity;
- Engage caging services or similar controls over any funds received by a third party to ensure that funds are delivered in a timely manner to the charity;
- Adopt a compliance process to reconcile contractors' records with the charity's records, including regular evaluation of contractors' electronic and paper accounts of revenue, interviews of staff, and visits to the facilities;
- Adopt internal management processes for review and approval of all solicitation materials, including scripts and other written content;
- Incorporate instructions to fundraising professionals to use unambiguous information for donors or prospective donors about the identity of the fundraising professional, and to avoid conflating the professional fundraiser's identity with that of the charity;
- Mandate that any online "crowdfunding" agreement requires disclosure to the public of all fees and percentages going to the crowdfunding company and the amount, if any, that is tax deductible as a charitable contribution; and
- Require a contract that ensures legal compliance with the 26 state laws for commercial co-ventures (CCVs), that includes accounting and other safeguards, that requires charity pre-approval of clear and conspicuous promotional language, and that includes other requirements designed to avoid deceptive or misleading fundraising (e.g., if there is a cap on how much the commercial co-venturer will donate to the charity, that needs to be clearly disclosed to consumers).

The FTC and NASCO emphasized in their announcement of the March 2017 conference that "Americans contribute a lot of their hard-earned money to charity—more than \$373 billion in 2015, which averaged about \$1,100 per adult and more than \$2,100 per household." Now, more than ever, charities — including their leadership—need to embrace key practices to bring themselves into full compliance with the federal and state laws and regulations governing charitable fundraising.

## AUTHORS

Jonathan L. Pompan  
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## RELATED INDUSTRIES

Nonprofit Organizations

## ARCHIVES

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## ARTICLES

February 28, 2012

### NINETEEN QUESTIONS EVERY CAUSE-RELATED MARKETER SHOULD BE PREPARED TO ANSWER: LESSONS FROM THE NY ATTORNEY GENERAL'S INVESTIGATION OF BREAST CANCER CAUSE-RELATED MARKETING

In November 2011, it was widely reported that the New York Attorney General (the "NY AG") had opened an investigation into the cause-related marketing efforts of "pink ribbon" charities. As part of its examination, the NY AG sent comprehensive questionnaires to at least 40 charities and 130 companies asking for detailed information specific to activities in which the sale of a product or service is advertised to benefit a charitable cause. Venable has since obtained a redacted copy of a typical questionnaire sent to companies involved in cause-related marketing related to breast cancer, a version of which appears below.

A cause-related marketer should review these questions (with a more in-depth analysis available [here](#)) to ensure that adequate answers could be given about a proposed campaign in the event of an investigation by a state regulator such as the NY AG.

Please answer the following questions regarding cause marketing campaign(s) concerning breast cancer conducted by your company and/or any of its subsidiaries, divisions or brands ("your company") at any time since October 1, 2009. For purposes of this questionnaire, cause marketing means any marketing of products or services which states or suggests that a charity or charitable cause will benefit from the purchase or use of the product or service. Please use a separate questionnaire for each cause marketing campaign and add additional pages to the questionnaire if necessary.

1. Name of your company.
2. Please name the charity or charitable cause that is the subject of your responses below.
3. What are the start and end dates for the campaign?
4. If the campaign has not ended, what is the date on which it is expected to end?
5. Identify the product(s) or service(s) used in connection with the campaign. (Attach additional pages if necessary)
6. Identify each method used to advertise or otherwise promote the product or service in connection with the campaign. Check all that apply:

q product packaging	q in-store advertising
q television	q radio
q print media	q website (provide web address)
q email	q Facebook
q Twitter	q other (describe)
7. Does (or did) the campaign require the consumer to take any action, other than making a purchase, in order for the charity or charitable cause to receive a benefit? (for example, mailing in a label or entering a code on a website)  
q Yes q No  
If Yes, please describe.
8. Please describe any benefit that the campaign stated or suggested would be provided to the charity or charitable cause.
9. Please describe the procedures for calculating the benefit due to the charity or charitable cause.

10. If the campaign stated that a percent or amount of your company's profits or proceeds or other financial measure would be paid to the charity or charitable cause, describe how "profits" and/or "proceeds" or other measure are defined and calculated.

11. Did your company guarantee a minimum contribution to the charity or charitable cause?

q Yes q No

If Yes, what amount was guaranteed?

12. Did your company place a limit (cap) on the amount it would pay to the charity or charitable cause?

q Yes q No

If Yes, what is the amount of the limit (cap)?

13. If there is a limit or cap, are procedures in place for discontinuing the promotion once the limit or cap is reached?

q Yes q No

If Yes, describe the procedures.

14. What are your procedures for disposing of and/or re-labeling remaining products after the termination of the campaign?

15. What is the total value of the contribution or other benefit that your company has provided to charity since the campaign began? List the date and amount of each payment or other benefit. (Attach additional pages if necessary)

16. If any contribution or other benefit has not yet been provided, please state below the date(s) on which such contribution or benefit is expected and the estimated value of such contribution or benefit. (Attach additional pages if necessary)

17. Identify each of your company's products that contained marketing for the campaign, and state the number of such products produced for the campaign and the number sold during the campaign. (Attach additional pages if necessary)

18. Did your company enter into a contract or other written agreement with any charity concerning the campaign?

q Yes q No

If Yes, please attach copies.

19. Have you provided accountings or reports to any charity detailing the amounts due to the charity in connection with the campaign?

q Yes q No

If Yes, please attach copies.

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*For more information, please contact Jonathan Pompan at 202-344-4383 or at [jlpompan@Venable.com](mailto:jlpompan@Venable.com).*

**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, Consumer Financial Protection Bureau, 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.*



## AUTHORS

Jonathan L. Pompan  
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## RELATED PRACTICES

Advertising and Marketing

## RELATED INDUSTRIES

Nonprofit Organizations

## ARCHIVES

2017 2013 2009  
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## ARTICLES

November 22, 2011

### CAUSE-RELATED MARKETING IN THE CROSSHAIRS: WHAT THE NEW YORK ATTORNEY GENERAL'S BREAST CANCER INVESTIGATION MEANS FOR NONPROFITS AND THEIR CORPORATE SUPPORTERS

The New York Attorney General has recently crossed into what some consider to be the hallowed ground of charities, by launching an investigation into cause-related marketing of "pink ribbon" charities. In its own recognition of National Breast Cancer Awareness Month, the New York Attorney General's Office (the "NY AG") is examining charities and commercial partners that are involved in a cause-related marketing campaign representing that a portion of the sales of a product or service will support breast cancer research or screening. Overall, this initiative highlights the focus of the NY AG in preventing charitable fraud in breast cancer charities. This action also demonstrates that organizations, both charities and marketers, engaging in increasingly popular cause-related marketing campaigns should pay close attention to state regulatory requirements for these activities.

#### New York's Recent Investigations

This new initiative is a continuation of the NY AG's focused effort on breast cancer charities. In June 2011, the NY AG filed a complaint against the Coalition Against Breast Cancer ("CABC"), which was alleged to be nothing more than a sham charity established to benefit its founders. According to the complaint, CABC solicited more than \$9.1 million from the public but spent virtually none of it on breast cancer programs. Instead, the founders used the contributions to provide benefits to themselves and their families. In addition, CABC allegedly deceptively advertised an affiliation with the Memorial Sloan-Kettering Cancer Center when, in fact, no such relationship existed. These activities provided the basis for multiple alleged violations of New York's not-for-profit and charitable solicitation laws. A preliminary injunction prohibiting the defendants from, among other things, soliciting or collecting charitable contributions from any person was granted by the court on November 1, 2011, and the case is ongoing.

Additionally, in August 2011, the NY AG secured guilty pleas against the founders of another breast cancer charity, the Coalition for Breast Cancer ("CFBC"), after the NY AG's office filed an action alleging the defendants operated a phony charity. The complaint alleged the husband and wife founders of CFBC solicited donations for breast cancer programs but instead diverted the money to pay for personal travel expenses, lavish meals, shopping excursions, and their daughter's sorority dues. As a result of these activities, the husband in this case pled guilty to two felony counts – one of grand larceny and one of scheme to defraud – while the wife pled guilty to one count of falsifying a business record for her role in opening bank accounts for the organization.

In the newest breast cancer charity investigations, the NY AG is spreading its reach to investigate nonprofits as well as for-profit businesses that engage in cause-related marketing. As the first step in its investigation, the AG has sent questionnaires to at least 40 charities and 130 companies. These questionnaires ask for detailed information specific to activities in which the sale of a product or service is advertised to benefit breast cancer causes. The NY AG is likely to use the information gleaned from the questionnaires to assess whether further investigation is needed in specific instances.

#### New York's Requirements for Commercial Co-Venturers

New York is typical of many states in that its charitable solicitation laws (specifically, The Solicitation and Collection of Funds for Charitable Purposes Act, N.Y. Executive Law Article 7-A) define a commercial co-venturer, or business that conducts cause-related marketing, and contain specific requirements for a commercial co-venturer. These requirements include having a written contact with the charitable organization and maintaining accurate books and records of activities for three years following the cause-related marketing campaign. Unlike several other states (such as Alabama, Maine, and Massachusetts), New York does not require that the commercial co-venturer register, obtain a license, or file a bond with the Attorney General. New York does specify, however, that any charity with which a

commercial co-venturer contracts must itself be registered.

The New York charitable solicitation laws also mandate that advertising surrounding the cause-related marketing campaign must contain specific disclosures such as the anticipated percentage of the gross proceeds or the dollar amount per purchase that the charity will receive. At the conclusion of the cause-related marketing campaign, the commercial co-venturer also is required to provide an accounting to the charity, including the number of items sold, the amount of each sale, and the amount paid or to be paid to the charity.

Aside from specific requirements for commercial co-venturers, the New York charitable solicitation laws also generally prohibit any person from engaging in a fraudulent or illegal act including “obtaining money or property by means of a false pretense, representation, or promise.” Importantly, New York does not require that either intent to defraud or an injury be shown to prove fraud. Therefore, it is very important for those involved in cause-related marketing campaigns to carefully review their advertisements to ensure that all regulatory requirements are met and that the campaign is not represented in a way that could be characterized as misleading or deceptive, such as by not including any maximum donation limits or implying that the money received will be given to a specific program if it is instead used for general purposes.

### **Recommendations for Marketers Conducting Cause-Related Campaigns**

The New York Attorney General’s investigation is rather unique in that its reach extends into examination of the activities of for-profit marketers. For many marketers, entering into a cause-related marketing campaign is the company’s first venture into charitable solicitation and the regulatory framework surrounding such activities. However, marketers should perform due diligence on potential partners when entering into any new commercial venture. In this case, cause-related marketing efforts should be no different. In fact, because charities are themselves subject to legal and regulatory requirements, the marketer is opening itself to some unique legal and relationship risks in cause-related marketing campaigns. For example, one risk may be that the charitable organization is not itself in compliance with applicable charitable solicitation requirements or is found to be a “scam” organization (such as the allegations in the complaints filed this summer by the NY AG against the two breast cancer organizations).

For these reasons, marketers should consider adopting contractual protections in their cause-related marketing agreements. These protections could address such areas as compliance with charitable solicitations laws and the Internal Revenue Code. The marketer also should develop a due diligence and reporting program in order to collect relevant information to confirm the charity’s compliance with applicable federal and state laws. Finally, provisions for indemnification of the marketer by the charity for any claim related to the legal or regulatory status of the charitable organization, as well as insurance to cover the indemnity obligation, also should be considered in the agreement with the charity.

### **Conclusion**

The most recent initiative by the NY AG highlights the increasing focus of state regulators on charitable solicitation in general and cause-related marketing campaigns in particular. Both charities and marketers involved in cause-related marketing should pay close attention to state requirements for charitable solicitation and prohibitions against fraudulent advertising. When it comes to accomplishing the mission of consumer protection, no cause, no matter how purportedly noble, is off-limits to scrutiny from state regulators.

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*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.*