



Next-Level Fundraising

Compliance Issues, Legal Risks, and Industry Developments
Affecting Charitable Solicitation Activities



Cristina I. Vessels

Associate | +1 202.344.4706 | CVessels@venable.com

Ashleigh A. Allione

Associate | +1 202.344.4252 | AAAllione@venable.com

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VENABLE LLP

States' Primary Objective: Consumer Protection

- States regulate fundraising to **protect the public**
 - Nonprofits, commercial coventurers,* and professional fundraisers file **registrations** and **financial reports** to disclose the results of their efforts
 - Require certain **contract terms** to be included in third party fundraising agreements
 - And anytime the public is asked to contribute, do, or buy something in order to trigger a donation, include **material disclosures**
- Adequately inform the public
- Don't mislead or hide terms about the charitable effect of consumers' purchases or actions



How Do Third Parties Fundraise for Charity?



Cause Related Marketing



Commercial Coventurers



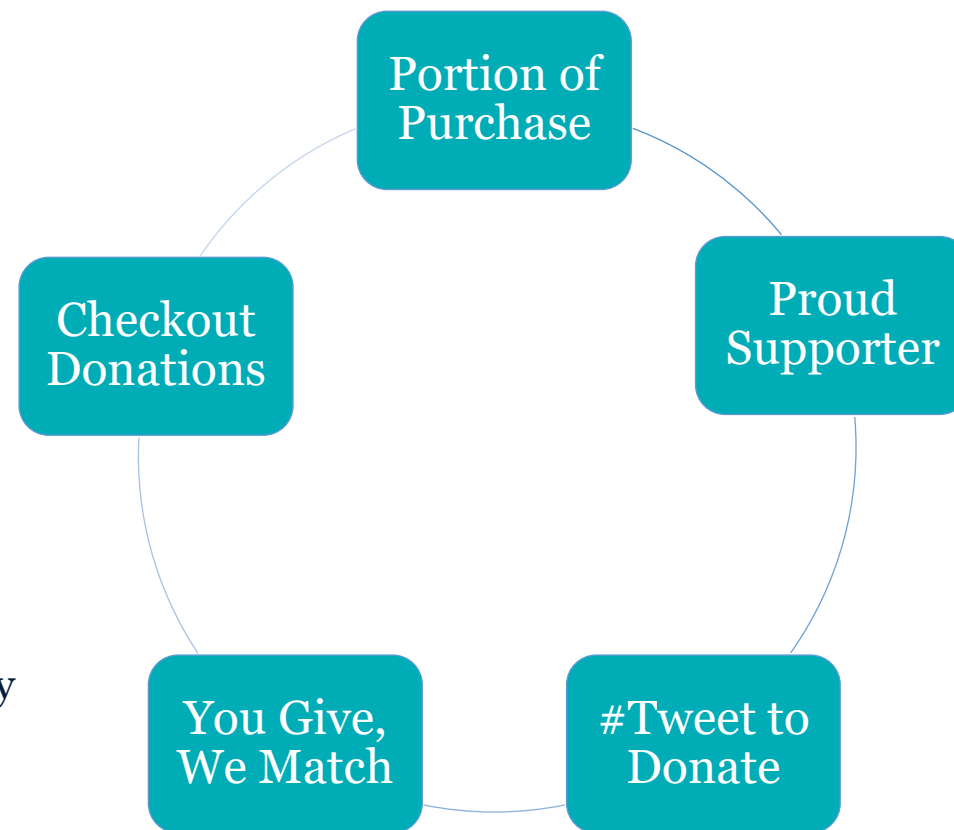
Professional Fundraisers



Fundraising Counsel

What Is Cause-Related Marketing?

- Various for-profit / nonprofit collaborations
- Both organizations receive some benefit
 - Charity:
 - Passive licensing of IP and receipt of funds
 - Serves to raise awareness, raise money (from the public or the company), etc.
 - Company:
 - Executes the campaign subject to approval by charity
 - Limited to no advertising from charity
 - Indirect benefit to company (e.g., “halo effect”)



Traditionally . . .

Commercial Coventurers

- A commercial coventurer (CCV) is any person who, for profit, advertises that the purchase or use of a good, service, or other thing of value will benefit a charitable organization
- Often require **contracts, registration, bonds, and reports**
 - CCV registers in: AL, CA*, HI, IL**, MA, MS, and SC
 - Charity registers in: AR, CT, NH, NJ, and UT
- **Disclosures** required for advertisements include the names of the parties, dates of the campaign, amount per purchase to benefit the charity, other material terms (minimums, maximums, discount codes), etc.



Traditionally . . .



Professional Fundraisers

- Any person who receives **compensation** in exchange for soliciting contributions
- May also include any person who has custody of, receives, or controls any funds raised for a charity
- Generally, does not include bona fide employees who perform some fundraising duties
- Also known as professional solicitors, commercial fundraisers, etc.
- **In sum:** Professional fundraisers are paid to ask for donations and/or may hold donations on behalf of a nonprofit

Traditionally . . .

Fundraising Consultants

- Any person paid to manage, advise, plan, produce, or design a solicitation, but who neither solicits contributions nor holds funds raised for a charitable organization
- Also known as fundraising counsel
- **In sum:** Fundraising consultants help develop a nonprofit's fundraising strategy or materials, but do not actually ask for donations on the nonprofit's behalf or hold donations



Nowadays . . .

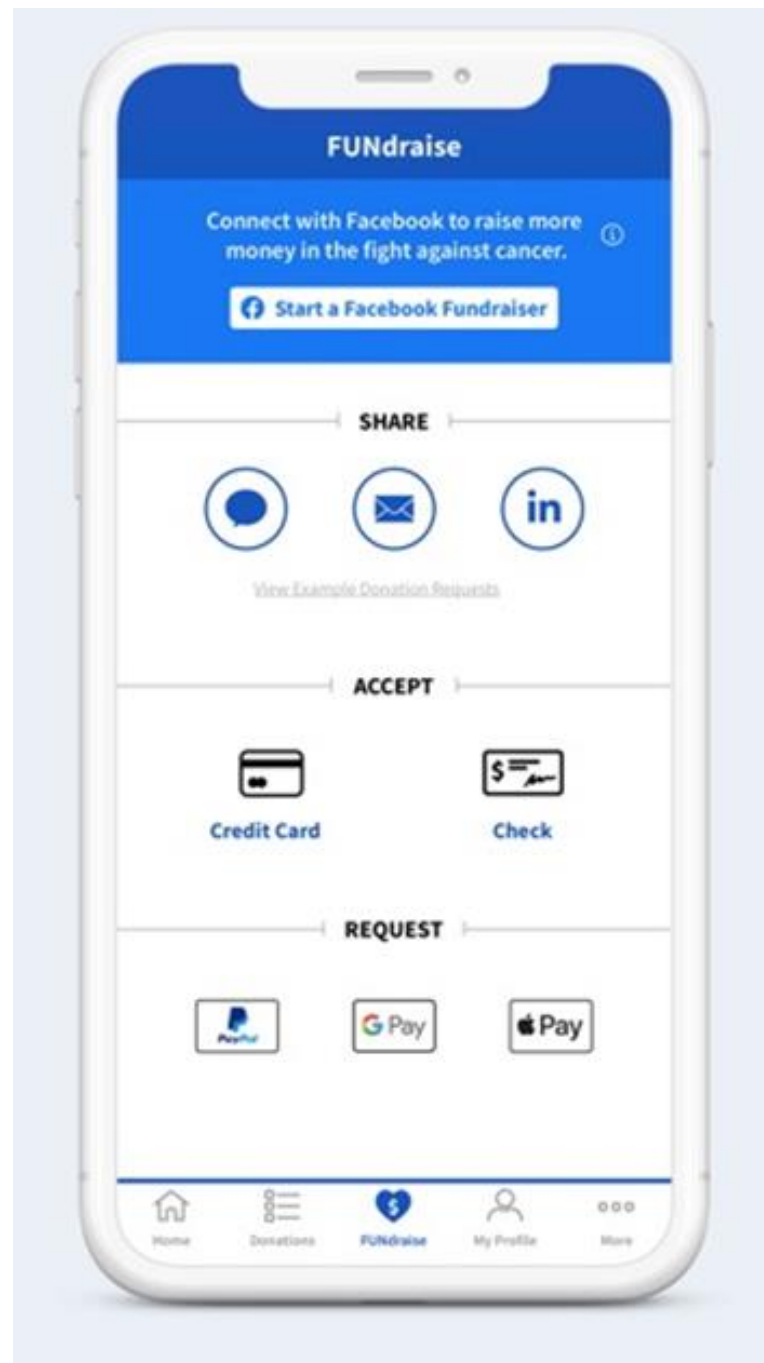


Old Tricks, New Twists

How Charitable Solicitation Laws Apply to Online Platforms, NFT Sales, eSports, and Other Digital Modes

Online Fundraising Platforms

- Platforms vary in structure and design
 - Prize and experience sweepstakes promotions
 - Charitable sales promotions
 - Crowdfunding or peer-to-peer fundraising
 - Round-up or other “register” donation programs
- Sometimes donations made through the platform are transferred directly to your organization
 - Platform → Your organization
- Other times (often), the platform has a partner charity that redistributes the funds received to your organization (the one named on the platform).
 - Platform → Partner Charity → Your organization
 - Platform → Partner Charity’s DAF → Your organization



What's the Challenge?



New Models Draw Regulatory Attention

- Because online charitable giving portals and platforms are not expressly regulated by most states' charitable solicitation laws, look to:
 - **General principles** of truth in advertising under consumer protection laws
 - **New legislation** percolating through state legislatures (e.g., recently approved Cal. AB488)
 - **Enforcement actions** and the recommendations or requirements issued there
 - [PayPay Giving Fund, Inc. Multistate Settlement](#)
 - [Omaze Settlement with California AG](#)
 - **State and federal guidance and manuals**
 - [FTC, Online Charitable Giving Portals](#)
 - [California AG Guide for Online Charitable Giving](#)

Example: California Assembly Bill 488

- **“Charitable fundraising platform”** – Any person, corporation, unincorporated association, or other legal entity that uses the internet to provide an internet website, service, or other platform to persons in this state, and performs, permits, or otherwise enables acts of solicitation to occur, such as:
 - Listing organizations as receiving/being recommended for grants by donor donations on platform
 - Facilitating peer-to-peer fundraising efforts
 - Allowing platform users to select organizations to receive/be recommended for donations to be made by platform, platform charity, or another third party based on purchases or activity by platform users
 - Listing organizations as receiving/being recommended for donations made by the platform based on purchases or other activity by users of the platform
 - Providing organizations with customizable website, software, or other platform so the charitable organization can engage in its own fundraising online
- **“Platform charity”** – An organization that facilitates solicitation efforts on a platform
- **“Beneficiary charitable organization”** – Entity listed or referenced by name on a platform
- Provides rules to classify an entity when multiple categories might fit (e.g., CCV, fundraiser, counsel)

Affirmative Obligations for Platforms

- Requires **registration** and **reporting** by the charitable fundraising platform and platform charity, though many details still need to be established by regulation by the state AG
- Prohibits solicitations for charities that are not in **good standing** with the IRS, California Franchise Tax Board, Attorney General's Registry of Charitable Trusts, or other CA authority
- Requires the platform or platform charity to **obtain written consent** of any recipient charitable organization before using its name in a solicitation unless specific exemption requirements are met
- Requires the funds raised to be held in a **separate bank account**
- Donations and grants of recommended donations to be **transferred promptly** to recipient charities, along with an accounting of any fees imposed for processing the funds
- Make "**conspicuous disclosures**" . . .

California A.B. 488 – Disclosures

- **Conspicuous disclosures** to prevent a likelihood of donor deception, confusion, or misunderstanding
- Provided before a person can complete a donation, select or change a recipient charitable organization
- Include, among other details:
 - The entity or individual to whom the donations will be made
 - That a recipient charitable organization may not receive donations, grants, or recommended donations and the reasons this may occur
 - The maximum time it takes to send the donation or grant of a recommended donation to a recipient charitable organization, and the reason for the amount of time taken
 - The fees and other amounts charged or retained by the charitable fundraising platform, platform charity, or any other partnership vendor other than digital payment processing fees
 - A statement about the tax deductibility of the donation
- Application within California only, but ripple effects expected to be felt outside of state (once enacted)

PayPal Charitable Giving Fund Multistate Settlement

- **Context.** Individuals could donate to PPGF and select a charity to which PPGF would then distribute an amount equal to the individual's donation. Most—but not all—charities enrolled themselves in the platform. If the charity didn't meet PPGF's vetting standard, then PPGF redirected the donation to a similar charity.
- **Scope.** PPGF facilitates donations through PayPal, eBay for Charity, Humble Bundle, GoFundMe, Airbnb, Nextdoor, Deed.
- **Issues.** Among others, the state regulators' primary concerns were that:
 - Not clear donors were donating to PPGF instead of directly to the individual charities.
 - Many charities were unaware that the PPGF was soliciting on their behalf.
 - A donation would not be provided to intended charity if it failed PPGF's vetting test; instead exercise of PPGF's variance power to reassign, but donors not so advised.
 - Inconsistent review of charities' compliance with states' charitable solicitation requirements
 - Time frame it would take for potential donations to reach the charities.

PPGF Disclosures

1. “Unavoidable and prominent” disclosures that **donations are to the Fund, not to selected charity.**
2. Avoid language implying that potential donors are **donating directly** to their chosen charity.
3. “Unavoidable and prominent” disclosures regarding **if fees associated with the platform**, even if none.
4. “Unavoidable and prominent” disclosures of **expected time frame** grant to selected charity will be made.
5. “Unavoidable and prominent” disclosures that Fund may, under defined circumstances, **reassign funds.**
6. Provide a general description of **circumstances that would cause the reassignment of funds** to a similar charity, and “directly accessible” link to straight-forward **explanation of any vetting process.**
7. Disclose if charities are reviewed for compliance with **state charitable registration requirements.**
8. Disclose that donors’ **contact information will not be shared** with charities **ineligible to receive a grant** as a result of any vetting procedures.
9. Notify donors **when Fund exercises its variance power** and redirects a donation to an organization different from the one the donor selected.

“Unavoidable and Prominent”

Information **must**:

- Not be included in an optional pop-up window
- Not be included on a separate, linked-page
- Be located on a page that each donor must access prior to donating
- Be immediately proximate to a necessary field/button used by each donor

100% of donations made here go to charity, no deductions, no fees

PayPal Giving Fund Donating Details

← Back

Choose an amount or enter your own



Women for Afghan Women
International, Human Services

 [More details](#)

 [Set as favorite charity](#)

\$25

\$50

\$75

\$100

Other (USD)

Share my name and email with this charity.

Donate Now

- PayPal covers all transaction fees.
- You're donating to PayPal Giving Fund, a 501(c)(3) charity, [subject to its terms](#).
- Donations can take **up to 45 days** to get to your chosen charity. It's rare, but if **we can't send your money to this charity**, we'll ask you to recommend another.
- If we can't reach you, we'll send it to a similar charity and keep you updated. Your donation is typically tax-deductible in the US.

NFTs

A **non-fungible token** is proof of ownership of a unique digital asset that is made possible because the purchase and sale happens through a blockchain.

- Often structured as a charitable auction; could be considered a charitable promotion (raising CCV compliance considerations)
- Contract to include IP license/consent; details on payment amount, guarantees, transfer, and costs; accounting of sale(s); etc.
- Disclosures: Any fees deducted from amount donated? Charity name and contact information?

Want to learn more? [NFTs and Virtual Currency in Games: Compliance Issues and Legal Risks](#)

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Introducing NFT(P) by Charmin. 🐝

Sometimes a better bathroom experience goes beyond the seat, that's why we're rolling out the first-ever NFT art by a toilet paper brand!

Bid on the digital art using the link below. All proceeds donated to [@directrelief!](#)

app.rarible.com/charmin

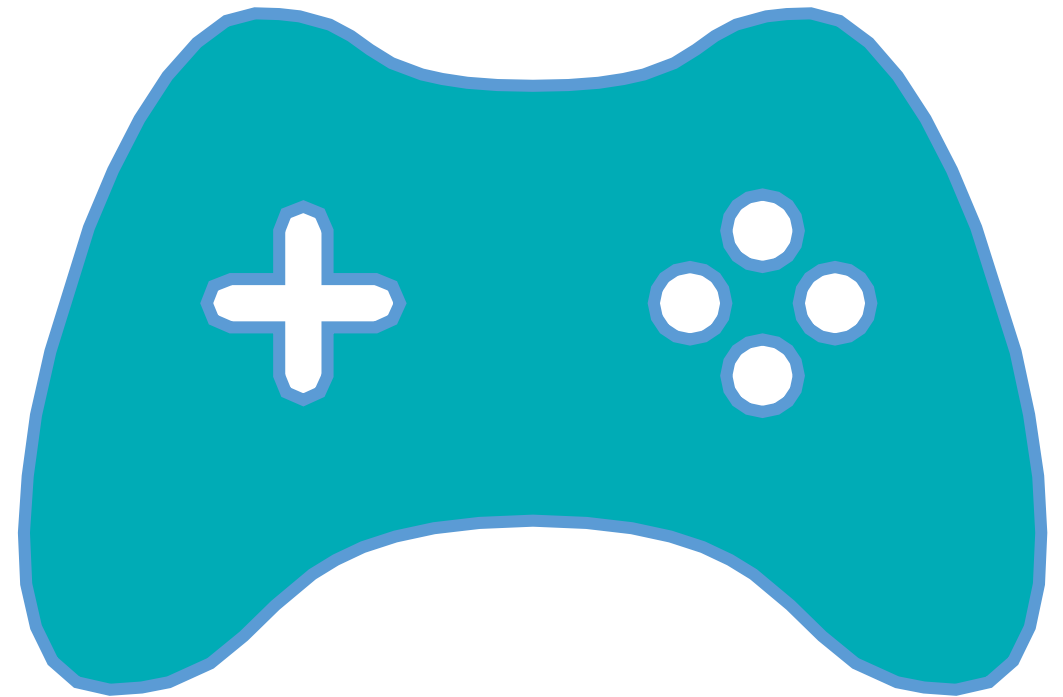


8:05 AM · Mar 17, 2021 · Twitter Web App

141 Retweets 779 Quote Tweets 470 Likes

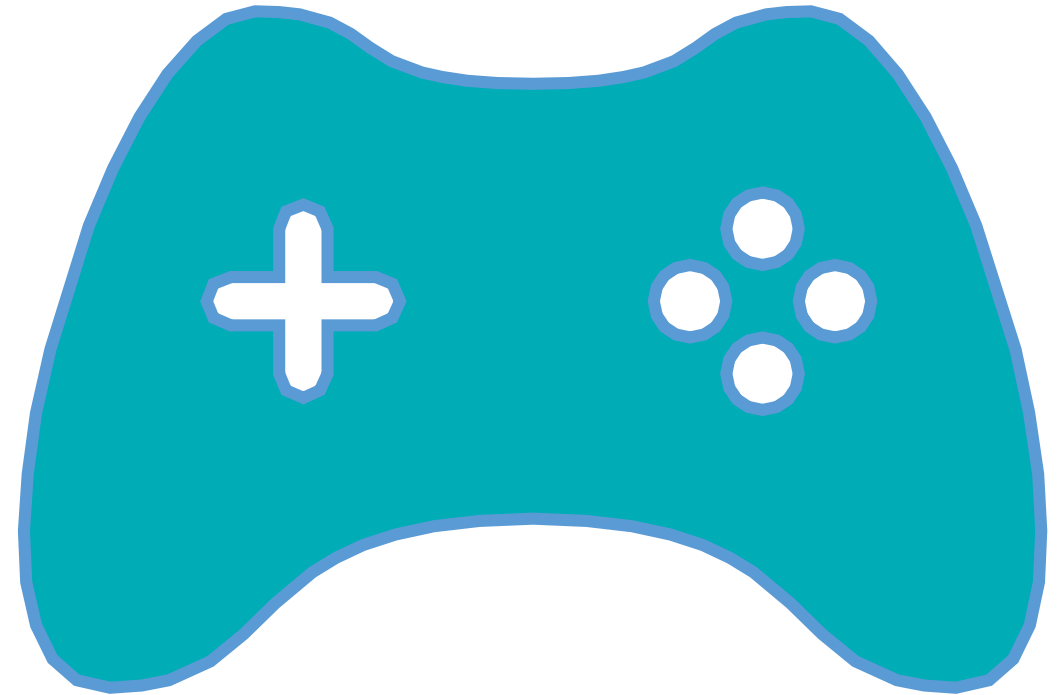
eSports 101

- Video game competitions played in tournament format
- Scholastic, amateur, and professional players
- Can be played live; often played online, as done through livestreaming platforms
- Professional gamers (or their sponsors) pay to enter competitions with top-dollar prizes; can also make money through advertising income, subscriptions
- Can raise a *host* of legal issues, like gambling and lottery laws, consumer protection rules, charitable solicitation laws, IP transactions/licensing, immigration, tax, etc.



eSports and Lottery Law Considerations

- Unless authorized under a particular exemption, it is illegal to conduct a **lottery** whereby a **prize** is offered on the basis of **chance** for which **consideration** is paid or provided for that chance to win.
- Prizes in **contests** are awarded on the **basis of skill**
- State legislative action to recognize eSports formally
 - Maryland Criminal Law § 12-114, effective Oct. 1, 2019, formally recognizes “eSports competitions” and permits an “organization conducting an eSports competition [to] offer prize money or merchandise to winning participants in an eSports competition.”
- Contest restrictions apply (e.g., no consideration allowed, additional disclosures, avoid any chance)



eSports Charitable Fundraising Considerations

Fundraising by Sponsor

- *“When you register to play in the XYZ Tournament, XYZ Sponsor will donate 25% of your registration fee to ABC Charity.”*
- *“For every new user who registers for a free account on XYZ gaming platform, XYZ Company will donate \$10 to ABC Charity.”*
- *“When you register for XYZ Tournament, consider adding a \$5 donation to your purchase to support the ABC Charity.”*

Fundraising by Gamer

- *“Over the next two hours, I want to raise \$300,000 for the ABC Charity. Please donate through my livestreaming page so we can support their mission of . . . “*
- *“For the next person to donate \$500 to ABC Charity, I’ll send them my autographed headset.”*

Charitable Fundraising Compliance Considerations

- Who has custody and control of the funds raised?
- Will the tournament sponsor or gamer receive or retain any amount from the funds raised?
- If funds do not pass directly to the charity's account, how and when are funds transferred?
- Can the parties agree on disclosures to be shared with viewers and where/how often they'll appear?
- For contributions of \$250 or more, how will donor details be shared with the charity to issue contemporaneous, written acknowledgments?
- Are there insurance, indemnification, and other contractual protections in case the gamer goes rogue?



How to Make It Work – Compliance Considerations

- ❑ Confirm ***Payment Structure*** to Determine ***Fundraising Status***
 - Does 100% of donation pass to the charity listed?
 - Does the platform retain a portion of funds raised?
 - Are donations to the charity based on sales or other actions on the platform?

- ❑ If CCV or professional fundraiser, consider ***registration, bonding, and reporting*** obligations
 - The payment structure typically determines whether CCV or professional fundraiser obligations exist (or, in CA, charitable fundraising platform obligations).

- ❑ ***Contract*** or other authorization to solicit
 - The payment structure typically determines whether CCV or professional fundraiser obligations exist (or, in CA, charitable fundraising platform obligations).
 - Who has custody and control of funds?
 - How and when are funds transferred or received by the charity?

How to Make It Work – Compliance Considerations

- ❑ **Disclosures** appropriate for activation?
 - States' charitable solicitation laws
 - Charity accreditation disclosures and requirements (e.g., BBB Wise Giving Alliance Std. 19)
 - California AB 488
 - PayPal Giving Fund – Multistate settlement disclosures
 - FTC Online Charitable Giving Portals guidance; consumer protection considerations
 - California AG Guide to Giving Portals

- ❑ Will **social media influencers** promote the campaign *and*
 - Solicit donations in doing so?
 - Receive other benefits resulting in a material connection?
 - Keep in mind that **professional fundraiser considerations** may also apply
 - As would the [FTC's Guide on Endorsements and Testimonials](#)

Questions?



Cristina I. Vessels



Ashleigh A. Allione



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