



Evolving Trends in Cause-Related Marketing

Keeping Your Company In Compliance

Melissa Landau Steinman
Partner | 202.344.4972 | msteinman@Venable.com

Cristina I. Vessels
Associate | 202.344.4706 | civessels@Venable.com

VENABLE_{LLP}

1



What We'll Cover

Charitable sales promotions and commercial coventurer activity

Customer donation programs

Online charitable platforms and other industry developments

Prize promotions (sweepstakes and contests) with charitable giving components

Endorsements and Testimonials

Mobile Giving

Privacy

VENABLE_{LLP}

© 2022 / Confidential / Slide 2

2

Oversight of Cause-Related Marketing

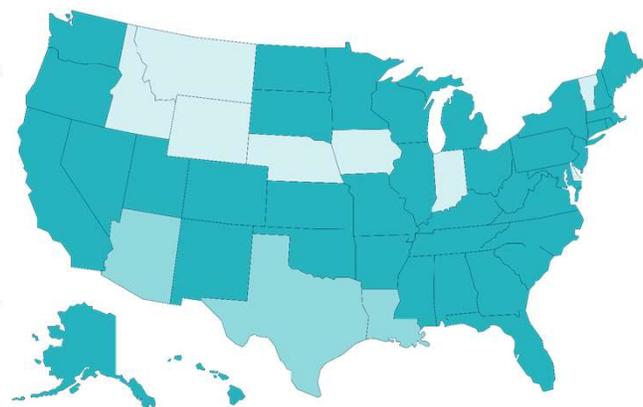
State and Federal Laws, Industry Standards

VENABLE_{LLP}

3

State Fundraising Regulation

- Charitable Solicitation Acts
- Approximately 40 U.S. jurisdictions regulate the solicitation of contributions
- A “solicitation” or “to solicit” is broadly any:
 - Direct or indirect request
 - For a contribution (money/property)
 - On the representation that the contribution will be used for charitable purposes



■ Registration for all, non-exempt nonprofits
■ Registration for select nonprofits
■ Registration not required

VENABLE_{LLP}

4

But It's Not Just Each State Alone...

- **Federal Trade Commission**
 - [Guidance on transparency and best practices for online charitable giving portals](#)
- **National Advertising Division (NAD) of the BBB National Programs**
 - Investigating and requiring substantiation for charitable giving claims (e.g., DoorDash)
- **Multistate Agency Investigations**
 - [PPGF Assurance of Voluntary Compliance](#)



VENABLE_{LLP}

5

Primary Objective in Regulation: Consumer Protection

- Fundraising is regulated to **protect the public**
 - Nonprofits, commercial coventurers, and others file **registrations** and **financial reports** to disclose the results of their efforts
 - Include certain **contract terms** in fundraising agreements to ensure transparency with the charity
 - And, anytime the public is asked to contribute, do, or buy something in order to trigger a donation, include **material disclosures in advertisements**
- Adequately inform the public
- Prevent consumer confusion
- Don't mislead or hide terms about the charitable effect of consumers' purchases or actions
- Play fairly with others (competitors)



VENABLE_{LLP}

6

Yes, Laws, But Remember Common Sense

- **Transparency and clarity are key**
 - Are the terms clear?
 - Will consumer have to think twice?
 - Review for ambiguities
 - Screen for multiple meanings
- **Be able to backup your messaging**
 - Contract with the charity should clearly lay out material terms and responsibilities
 - Document contributions (both outbound funds and accounting supporting the amounts)



VENABLE_{LLP}

7

Marketing Your Company's Charitable Giving

Be Creative *AND* Compliant

VENABLE_{LLP}

8

How Do Third Parties Fundraise for Charity?



Cause-Related Marketing



Commercial Coventurers



Customer Donation Programs and Online Giving Platforms



Professional Fundraising and . . . Sweepstakes

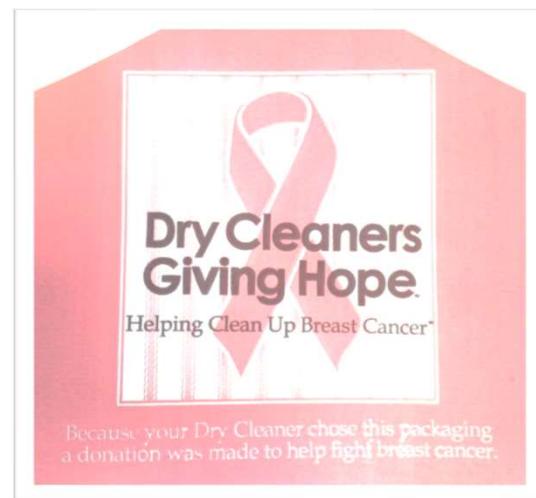
VENABLE_{LLP}

© 2021 / Confidential / Slide 9

9

Cause-Related Marketing Is An Umbrella Concept

- **Mutually beneficial arrangements**
 - Promote brand and/or products
 - Raise awareness for the charity's mission
- **Dozens of permutations, like:**
 - CCV promotions
 - Free action campaigns
 - Customer donation programs
 - Matching campaigns
 - Auctions
- **Compliance typically involves:**
 - Contract with or consent from the charity
 - Disclosures appropriate for the campaign
 - State filings (maybe)
 - Reporting to the charity and states



VENABLE_{LLP}

© 2022 / Confidential / Slide 10

10

Charitable Sales Promotions by CCVs

A commercial coventurer is generally:

- Any person who
- **Advertises**
- A charitable sales promotion

A charitable sales promotion is a campaign where:

- The **purchase or use**
- Of a **good or service**
- Is advertised as benefitting a charitable organization

How It Works

Every time you swipe, we plant trees to reduce your carbon footprint — and give you extra cash back rewards once you get down to zero. All for just \$60 per year.

1

Fight climate change with every swipe

We plant a tree every time you make a purchase—and let you round up to plant one too.

2

Go carbon-neutral

Using this card just once a day can plant enough trees that, once grown, will counteract your daily negative carbon footprint (unless you're a real gas-guzzler!). Track your progress in our app.

3

Get rewarded

Every month you get to carbon zero, we'll reward you with up to 1% cash back on all of your purchases.

© 2022 / Confidential / Slide 11

All rights reserved.

To be no used, filed, or otherwise disclosed without the prior written consent of the issuer.

VENABLE_{LLP}

11

CCV Compliance

Contract:

- CCV must have nonprofit's "written consent"
- Agreement must often include certain statutorily required terms (*e.g.*, geographic scope of promotion, promotion dates, estimated units of goods or services to be sold, etc.).

Pre-Promotion Compliance:

- Register, post bond, and provide notice, as required
- Evaluate whether AL, CA, HI, IL, MA, MS, or SC require the CCV to submit filings, bonds, etc.

Post-Promotion Compliance:

- Provide accounting to benefitting nonprofit (*e.g.*, New York's 90-day reporting requirement)
- Provide payment to benefitting nonprofit (*e.g.*, California's payment timeline for CCV registration exemption is 90 days)
- File summary reports with states, as needed
- Record-retention periods (usually 3 years)

VENABLE_{LLP}

12

Disclosures for Charitable Sales Promotions

Between date and date, Company will donate to Charity X% of each Widget sold online at company.com, with a minimum guaranteed donation of \$Y and up to a maximum possible donation of \$Z. Charity is a 501(c)(3) nonprofit organization, whose mission is to . . . To learn more about Charity, visit charity.org. No portion of purchase is tax deductible.

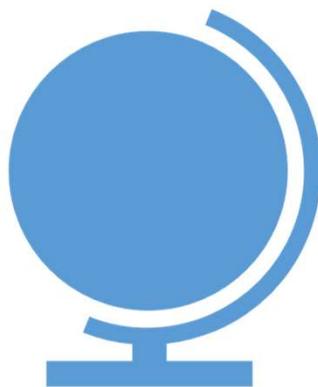
- State law requirements (minimal)
- [New York AG Best Practices](#)
- [BBB Wise Giving Alliance, Standard 19](#)
- Other industry standards
- Include at least:
 - Names of the parties
 - Dates of the campaign
 - Amount per purchase to benefit charity
 - Statement of non-deductibility
 - Charity contact info and mission
 - Other material terms (minimums, maximums, discount codes), etc.

VENABLE_{LLP}

© 2022 / Confidential / Slide 13

13

International Charitable Sales Promotions



- Yes, similarities exist, but plenty of particulars and differences
- Consider, for example:
 - Disclosure requirements
 - Currency calculations
 - Restrictions and limitations on describing the “charity”
 - Tax-deductibility of contributions
 - Registration obligations (for CCV, charity)
- Weigh proposed business benefits with compliance costs and tolerance for risk

VENABLE_{LLP}

© 2022 / Confidential / Slide 14

14

Customer Donation Programs

- Retailers offer **in-store** customers chance to donate (flat amount, round-up the change, matching, etc.)
- Not a typical CCV arrangement; consider charitable trustee rules
- Ensure 100% of customers' donations are transferred to the charity to avoid professional fundraiser status
- Agreement should provide license to charity's name and marks, outline payment terms, accounting, limits on donations (\$249.99 or less?), limited agency to handle contributions
- Disclosures should include, at least, amount to be transferred and charity's name, mission, and contact information

VENABLE_{LLP}

SEE HOW FAR YOUR MONEY CAN GO

Put planet-saving on autopilot

Reforest while you shop

With your Aspiration debit and credit cards, you'll be able to plant a planet-saving tree with every purchase you make simply by rounding up to the nearest dollar. Our Aspiration community plants more trees than there are in New York's Central Park every day.

We work with leading reforestation partners around the world so that our tree initiatives restore and protect biodiversity, enhance native ecosystems, and support local communities. Our planting locations include Kenya, Mozambique, Madagascar, Honduras, Brazil, and here in the U.S.—with more locations and projects on the way.

15

But . . . Evolving Rules for Online Giving Platforms

- Charitable solicitation laws developed prior to the internet, and even with the Charleston Principles, online fundraising efforts have not always had a clear path to compliance (e.g., web-based round-up programs, charitable sweepstakes, choose-a-charity campaigns, etc.)
- California enacted AB 488 last fall, regulating **charitable fundraising platforms, platform charities, and beneficiary charitable organizations**
- A charitable fundraising platform is, generally, any entity that *uses the internet* to provide a website, service, or other platform to persons in this state, and performs, permits, or otherwise enables acts of solicitation to occur
- Types of activities include: commercial, peer-to-peer, marketing, consulting, and coventuring-style fundraising efforts and activities
- Will require registration and reporting; specific disclosures; and administrative obligations (like transferring funds "promptly," verifying the "good standing" of beneficiary organizations, etc.)

VENABLE_{LLP}

© 2022 / Confidential / Slide 16

16

How Might AB488 Affect Your Company's Efforts?

Imagine. . . Company X sells widgets on its **website** and gives customers the option to **round-up** the value of their purchases to one of a **few charities** as **selected by the customer**. Company transmits the donor's round-up change to the chosen charity directly and does not use a platform charity as an intermediary.



VENABLE_{LLP}

© 2022 / Confidential / Slide 17

17

Well, There's a Fair Bit More To Do Now

Under the proposed regs, the company may be a "commercial charitable fundraising platform" that should:

1. **Register** with California before starting the campaign and **pay the fee** (\$625)
2. Verify that each charity partner is in **good standing**
3. Either obtain **written consent** from each benefitting charity **or** make certain disclosures related to not having the charity's consent (written agreements would be subject to certain requirements)
4. Provide **conspicuous disclosures** before the customer donates
5. Hold funds raised in a **separate account**
6. Provide donors with a **tax donation receipt** within 5 days of the donation being made . . .
7. Transfer funds **promptly** (generally within 15 days of the donor's donation) to the charity
8. Concurrently send the recipient charitable organization an **accounting** including specific details
9. Provide **written notice** to persons who caused a donation to be made within 15 days of transferring the donation to the charity unless the person opted out of receiving such notices
10. File a **report** annually by July 15 for fundraising efforts occurring during the preceding calendar year

VENABLE_{LLP}

© 2022 / Confidential / Slide 18

18

Charitable Fundraising Platform Disclosures . . . Some Differences from PPGF

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
 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.

VENABLE_{LLP}

© 2022 / Confidential / Slide 19

19

Side Bar: Comments on California's Proposed Regulations

- Any person interested in submitting written comments on California's proposed implementing regulations for AB 488 may do so before **5pm PST on July 12**.
- The California Department of Justice will hold a public hearing on the proposed regulations at 9am PST July 13.
- The hearing can be [viewed online](#).

VENABLE_{LLP}

© 2022 / Confidential / Slide 20

20

But beyond the usual . . .

Crowdfunding

Twitch

NFTs

eSports

Tiltify

YouTube

Instagram

Facebook

TikTok

Influencers

Celebrity Ambassadors

Cryptocurrency

Next thing that we're all much too old for...

VENABLE_{LLP}

21

Charitable Raffles and Sweepstakes

Lottery & Gambling Laws

Charitable Solicitation Laws

- Federal and state laws prohibit privately-run lotteries, which have the following elements:
 - (1) The awarding of a **prize**
 - (2) By **chance**, where
 - (3) Participants must submit **consideration** to enter
- Charitable raffles are lawful in most states subject to registration and other requirements for charitable gaming.
- However, multi-state online raffles aren't possible due to state law restrictions, so pivoting to charitable sweepstakes may make sense.
- For lawful prize promotions, legal requirements for advertising disclosures/rules are extremely specific
- Significant overlap with traditional sweepstakes (rules, specific terms/material terms, disclosures, registration and bonding, if applicable)
- But also forces consideration of charitable solicitation laws

VENABLE_{LLP}

© 2022 / Confidential / Slide 22

22

The Rising Popularity of Charitable Sweepstakes

- Increasing popularity of sweepstakes offered by nonprofits, or commercial entities working with nonprofits
- What laws apply?
 - Fla. Rev. Stat. § 849.0935— explicit (unique) exception to lottery laws for nonprofit sweepstakes
 - Professional fundraiser laws – be careful to avoid inadvertently tripping
 - California Penal Code § 320 and the CA attorney general settlements/cease and desist letters with charitable sweepstakes websites
- Distinct from a commercial co-venture campaign, which involves a purchase and donation and may trigger registration, bonding, contract, and accounting requirements
 - Also different from raffles, which are restricted to nonprofits and subject to specific statutory requirements., including registration, residency, prize limits
- Auctions, which are also distinct, may be subject to state auctioneer laws

VENABLE_{LLP}

© 2022 / Confidential / Slide 23

23

Compliant Charitable Sweepstakes

- **Comply with sweepstakes laws and charitable solicitation laws, plus best practices**
 - No donation required method of entry should be clearly/conspicuously disclosed near method of entry; other required disclosures should be made
 - Obtain charity's consent to use their name and marks, give them approval rights over uses
 - Arrange for "prompt" transfer of donations or, better yet, have donations route directly to charity
 - Ensure charity is in "good standing" with applicable state and federal authorities
- **Follow state law/PPGF Settlement frameworks for disclosures, as applicable**
 - Make "unavoidable and prominent" disclosure whether fees are charged on donations raised (and how much is charged) and/or the circumstances surrounding the use of an intermediary charity to process donations
 - Key issue in recent class actions
 - Conspicuously disclose the name, contact information, and tax-exempt mission of the charity to whom donations will be made and other material terms
 - Disclose whether the charity has been reviewed for compliance with applicable law(s)
 - Ascertain whether, and with whom, potential donors' contact information will be shared
 - Is the donation is tax-deductible? (Usually no with sweepstakes)

VENABLE_{LLP}

© 2022 / Confidential / Slide 24

24

Non-Fungible Tokens (NFTs) and Cryptocurrency

Increasing use of NFTs and cryptocurrency as prizes in sweepstakes (NFTs = non-fungible tokens) may trigger unique issues:

- **Terms and conditions:** Make sure your audience understands what you are talking about; need for clear definition of terms;
- **Intellectual property:** NFTs are unique, one-of-a-kind digital files, which may trigger IP considerations regarding copyright and reproduction rights.
- **Fees:** Any additional fees (e.g., in opening wallet) must be disclosed as well.
- **Sweepstakes:**
 - **Consideration:** For sweepstakes, requirement to purchase an NFT or cryptocurrency may be consideration and may trigger lottery laws. May provide free AMOE, but must clearly and conspicuously disclose it. See *Suski v. Coinbase Global, Inc.*
 - **Prize value:** Cryptocurrency may rise and fall in value over the course of a sweepstakes, and NFTs may have no value at all, except as determined by the secondary market.
 - **Chance:** Is there inherent randomness in numbering of NFTs? What about exchanges where certain NFTs are signed or have specified characteristics—is there chance there?

VENABLE_{LLP}

© 2022 / Slide 25

25

How You Market Your Sale Matters

The screenshot shows the top portion of a Washington Post article. The header includes the Washington Post logo with the tagline 'Democracy Dies in Darkness' and the author's name, Cristina Vessels. Below the header is a navigation bar with categories like Politics, Fact Checker, Biden administration, The 2020s, Polling, Redistricting tracker, and Elections. The article title is 'Melania Trump emerges to launch new NFT platform meant to 'inspire' – and earn cash', written by Mary Jordan on December 17, 2021, at 6:00 a.m. EST.

Trump's first NFT offering is a watercolor depiction of her "cobalt blue eyes" called "Melania's Vision." She said it would provide "the collector with an amulet to inspire." Each NFT will cost about \$187.

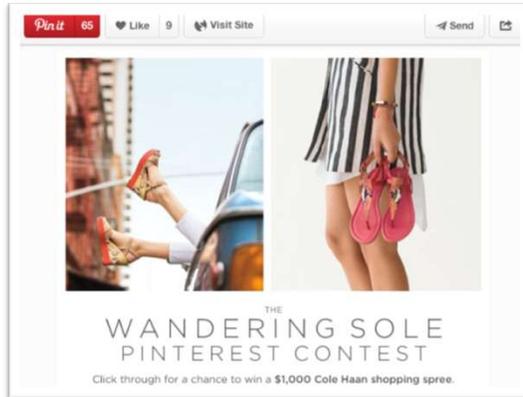
Next month, the former first lady said she will offer NFTs in a "a one-of-a-kind auction of historical importance" that will include "digital artwork, physical artwork, and a physical one-of-a-kind accessory." She did not elaborate.

Trump's statement said "a portion of the proceeds" will assist "children aging out of the foster care system," but her office did not respond to questions about how big that portion will be.

VENABLE_{LLP}

26

FTC Endorsements Rule Disclosure Requirements



- **Basic rule:** Per FTC's Endorsements and Testimonials Rules, if an endorser (e.g., influencer) received material consideration for talking about a product on social media, it should be disclosed
 - FTC is updating rules to address new technologies and developments right now
 - States take same approach/enforce rule as well
- **Sweepstakes/Contests Corollary:** Must require sweepstakes entrants to include disclosure indicating their entry (tweet, post, etc.) has been incentivized. Acceptable disclosures/hashtags include:
 - #[company]Sweepstakes
 - #contestentry
 - #ad or #promotion
 - NOT #sweeps or other abbreviations
- Employees should also disclose connections

VENABLE_{LLP}

27

Substantiate Claims, Keep Your Promises

Substantiate.



Your.

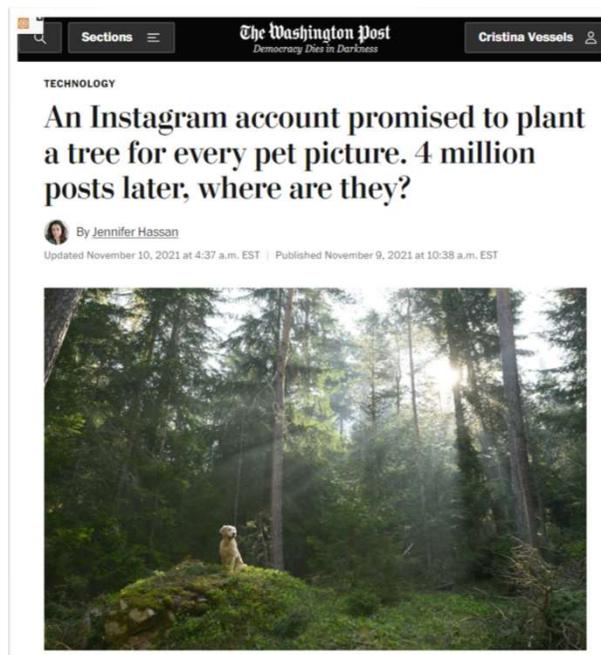


Claims.



- Invoices
- Donation acknowledgment letters
- Executed contracts
 - *NB:* Need this for charitable solicitation law purposes, too!

VENABLE_{LLP}



28

Recent NAD Decisions

The National Advertising Division, the self-regulatory arm of the BBB, is looking at statements about charitable commitments and seeking to ensure the money is going where the brands say it is, and companies creating CCVs and charitable giving campaigns should be prepared to provide documentation to support their claims. NAD evaluated and found the following were substantiated:

- **DoorDash, Inc.:** *We are donating \$1 million, with \$500,000 going to Black Lives Matter and \$500,000 to create a fund to be directed by the Black@DoorDash ERG (Employee Resource Group) towards state and local organizations.* NAD found substantiated.
- **Niantic, Inc.:** We're donating proceeds from gaming competition ticket sales, with a minimum commitment of \$5M to support, 50/50 "black gaming" and US nonprofit organizations; \$100K to nonprofit supporting human rights of Black transgender people, with an employee match up to \$50K; Various contributions—some general, some earmarked—for nonprofit supporting child learning and game development

VENABLE_{LLP}

29

Mobile Giving and Campaigns

Telephone Consumer Protection Act

TCPA prohibits using automatic dialing systems to make calls to wireless devices without express prior consent

- Text messages included in definition of "calls."
- Must have prior consent from the consumer to receive messages from that specific entity (not affiliate).
- Prior donor or membership doesn't count as consent
- Considerable exposure/litigation on this issue.

States are passing additional laws regulating telemarketing/text marketing that may be extremely restrictive as well.

VENABLE_{LLP}

CTIA, The Wireless Association®-- Guidelines for Mobile Giving via Wireless Carrier's Bill

- Qualified/accredited charities may lease short codes from Common Short Code Administration at 60% reduction to published rates.
- Must comply with Mobile Marketing Association's guidelines and provide consumers with a separate opt-in for each type of activity.
- Campaigns subject to certain limitations (e.g., no gaming).

Carrier Rules may have additional requirements for engaging in mobile giving campaigns – size of charity, years in existence, etc.

© 2012 Venable LLP

30

Privacy

California Consumer Privacy Act applies to any company that (a) has \$25 million or more in annual sales that (b) buys, sells, or shares information on 50,000 or more individuals, households, or devices, and (c) derives more than half of its annual revenue from selling personal information. It provides consumers with specific rights with regard to their personal information:

1. The right to know
2. The right to opt out
3. The right to control and be forgotten
4. The Right to Exercise Privacy Rights Without Prejudice

While the CCPA does not apply to nonprofit organizations, it does apply to the companies they do business with. Additionally, nonprofits should expect a change in expectation in supporters for how their private data is handled.

VENABLE LLP

© 2022 / Confidential / Slide 31

31

Final Charitable Fundraising Compliance Considerations

- Who has custody and control of the funds raised?
- Will the company, an influencer 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 from a separate corporate account?
- Agree on disclosures (and rules, if applicable) and where/how they'll appear.
- How will donor details be shared with the charity to issue contemporaneous, written acknowledgments (if applicable)?
- Have the parties confirmed applicable state registration, bonding, and related filing requirements?



VENABLE LLP

32

Questions?

Melissa Landau Steinman
Venable LLP
202.344.4972
mlsteinman@Venable.com



Cristina I. Vessels
Venable LLP
202.344.4706
civessels@Venable.com



VENABLE_{LLP}

© 2022 Venable LLP.
This document is published by the law firm Venable LLP. It is not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations that Venable has accepted an engagement as counsel to address.

VENABLE_{LLP}