

VENABLE[®] LLP

How Nonprofits Can Raise Money and Awareness through Promotional Campaigns without Raising Legal Risks

Melissa Landau Steinman, Esq.
Mikhia E. Hawkins, Esq.
Venable LLP

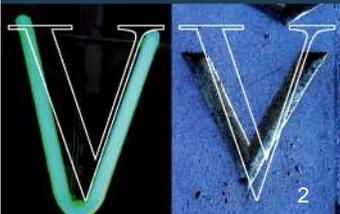
Association of Corporate Counsel Nonprofit Organizations Committee Legal Quick Hit
February 14, 2012



How Can Nonprofits Raise Money Using Promotional Campaigns?

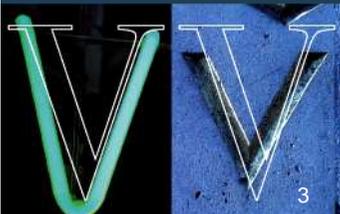
Promotional campaigns by nonprofits, their agents, and for-profits that engage in “cause marketing” are heavily regulated under state law. Each entity is separately regulated:

- Charity / Nonprofit Organization
- Professional Solicitor
 - Professional Fundraiser
 - Professional Fundraising Counsel / Consultant
- Commercial Co-venturer
- Types of Regulations:
 - Charitable registration requirements
 - Registration and filing, bonding requirements applicable to professional fundraisers/professional fundraising counsel, commercial co-venturers
 - Contract requirements
 - Advertising disclosures



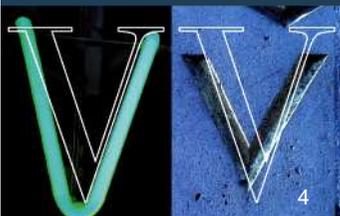
Current State Regulation – Charitable Organization

- About 45 states require charities to register
- **Triggering Definition** -Generally triggered by “solicitation” – affirmative act of asking for a gift (“contribution”) or selling goods/services that will **benefit a charitable cause**.
- **Typical Exemptions**
 - Religious organizations
 - Organizations that do not raise more than a specified amount from public (all states) if fundraising **conducted by volunteers**
 - Organization soliciting only within membership
 - Hospitals
 - Named individual
- **Uniform Registration Statement** –currently accepted by 38 states (not CO, FL, OK)
 - <http://www.multistatefiling.org>
- Common Requirements
 - *Registration and renewal*
 - *Disclosures when soliciting (i.e. identification)*
 - *Annual reporting requirements*



Current State Regulation – Professional Solicitor / Professional Fundraising Consultant

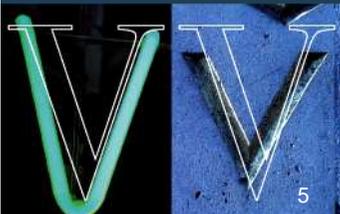
- **Professional Solicitor** - for a fee, solicits the general public on behalf of a charity OR has custody and control of funds
- **Professional Fundraising Counsel** – manages, advises, plans, produces or designs a solicitation, no direct solicitation and not holding funds
- About 41 states require registration and other requirements
 - *Registration*
 - *Bond*
 - *Filing of contracts*
 - *Disclosures*
- Often mandatory requirements from states for **inclusion in contracts**:
 - Charity right to rescind
 - Gross collections delivered to charity
 - Donor list is intellectual property of charity
 - Listing of fee calculation
 - Signature of two charity officials



Current State Regulation – Commercial Co-Venture

- **Commercial Co-Venture (“CCV”)** – An arrangement between a charity and a commercial entity under which the commercial entity advertises in a sales or marketing campaign that the purchase or use of its goods or services will benefit a charity or charitable purpose

“Every time you buy a bottle of Ethos[®] Water, you contribute 5 cents to the Ethos[®] Water Fund, part of the Starbucks Foundation”



CCV – Example

New Balance – Lace Up for the Cure

FREE SHIPPING WITH ANY LACE UP FOR THE CURE ORDER

Lace Up Collection

SHOES

- [View All Shoes](#)
- [Casual/Dress](#)
- [Cross-Training](#)
- [Running](#)
- [Sandals & Slides](#)
- [Toning](#)
- [Walking](#)

APPAREL

- [View All Apparel](#)
- [Casual Tops](#)
- [Performance Tops](#)
- [Jackets](#)
- [Shorts & Skirts](#)

ACCESSORIES

- [View All Accessories](#)
- [Bags](#)
- [Hats & Gloves](#)
- [Laces](#)
- [Socks](#)
- [Sports Bras](#)
- [Sports Monitors](#)
- [Sunglasses](#)

LACE UP FOR THE CURE COLLECTION

Honor loved ones who have been affected by breast cancer. Celebrate survivors. Show your support for the cause.

As part of our efforts to promote good health for everyone, New Balance will contribute 5% of the suggested retail price of sales from the Lace Up for the Cure® Collection with a guaranteed minimum donation of \$500,000 to Susan G. Komen for the Cure®.

Lace Up Shoes

Your favorite New Balance running, walking and toning shoes in pink Lace Up designs.

[View All Lace Up Shoes](#)

Lace Up Apparel

The performance apparel you expect from New Balance featuring empowering messages.

[View All Lace Up Apparel](#)

Lace Up Accessories

Show your support from head to toe in hats, socks, bags and more that sport the Lace Up logo.

[View All Lace Up Accessories](#)

Personalize the Fight

Celebrate a survivor in your life with a personalized pair of 993 running shoes.

[Create a pair now](#)

The 860 Walking Shoe

Official shoe of the Susan G. Komen 3-Day for the Cure™.

[Shop the 860 Walking Shoe](#)
Also available in Running

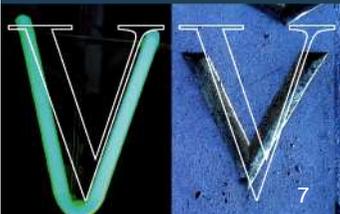
What's Popular In our Lace Up for the Cure Collection



Current State Regulation – Commercial Co-Venture (cont'd)

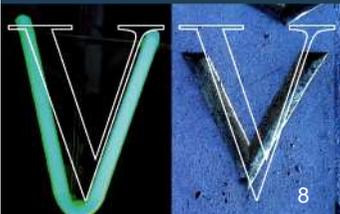
- About 24 states have laws that specifically regulate CCVs
 - *Registration*
 - *Bonding*
 - *Written Contract*
 - *Advertising Disclosures*
 - *Accounting & Recordkeeping*

- Commercial Co-venturer – “**must have**” for contracts
 - Branding and intellectual property terms
 - Term and termination
 - Reps and warranties re: compliance with laws
 - Advance approvals
 - Clear tax treatment and description of activities
 - Bifurcate activities with differing tax treatment or enter into separate agreements
 - Indemnity and insurance
 - Conflict of interest and confidentiality



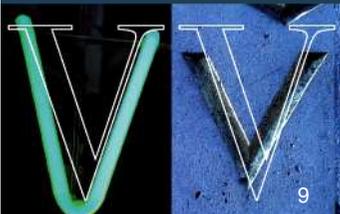
Regulation of Commercial Co-Ventures (cont'd)

- Examples of enforcement actions involving commercial co-ventures:
 - McNeil Consumer Products Company / Arthritis Foundation (1999)
 - 19 state Attorneys General entered into settlement with McNeil and AF
 - AGs took issue with ads for McNeil pain medicines representing that portion of each purchase would go to AF, when in fact McNeil paid AF a flat fee of \$1 million per year, plus a percentage of sales if sales reached certain levels.
 - Led to a 1999 multi-state AG report on commercial co-ventures setting forth standards for such campaigns
 - Yoplait Breast Cancer Research Foundation Campaign (1996)
 - Georgia AG investigated General Mills' advertising that for each Yoplait lid collected, it would make a contribution to the foundation, without disclosing that the total agreed-to maximum donation was \$100K.
 - General Mills ultimately donated an additional \$63K, representing the amount it would have donated for each lid collected by Georgia residents



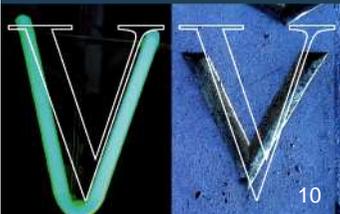
Fundraising Raffles / Sweepstakes

- Federal law and all states prohibit lotteries (except state-run lotteries). A lottery has the following elements:
 - (1) The awarding of a ***prize***
 - (2) By ***chance***, where
 - (3) The participants have been required to submit ***consideration*** to enter
- In many states certain charitable fundraising games of chance are exempt from lottery prohibitions
- However, states require registration/permit for charitable gaming



Fundraising Raffles / Sweepstakes (cont'd)

- In some states, an organization must have been in existence in the state for a minimum amount of time to qualify for charitable gaming exemption.
 - E.g., Indiana
 - An organization must have been continuously in existence in Indiana for at least 5 years; OR
 - The organization must be affiliated with a parent organization that has been in existence in Indiana for at least five 5 years.
- Residency and registration/permit requirements limit ability to offer fundraising gaming via the Internet



Fundraising through Social Media

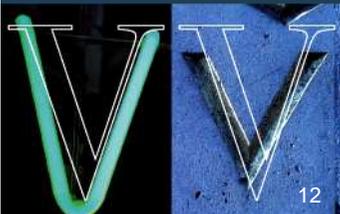
- Social Networking sites – Facebook, Twitter, LinkedIn – have their own rules that apply to prize promotions run by nonprofits as well as for-profits.
 - **Facebook’s Promotion Guidelines:**
 - Promotion may not be administered directly on the site, must be administered through a third-party Facebook Platform application
 - Cannot use Facebook functionality or feature as an entry mechanism; e.g., “Liking” a profile page or posting a comment on a wall. Also cannot condition entry into the promotion upon taking any other action on Facebook; e.g., liking a status update or uploading a photo.
 - However, can condition entry on a user “liking” a Facebook page, checking in to a “Place”, or connecting to the Facebook platform-based promotion application *as part of* the entry process. E.g, can require that users “like” a Facebook page and then submit a completed entry form to enter.
 - Must include specific releases, acknowledgments and disclosures regarding Facebook’s non-affiliation with the promotion and the promotion sponsor’s collection of data from entrants in the rules and on entry form



Fundraising through Social Media (cont'd)

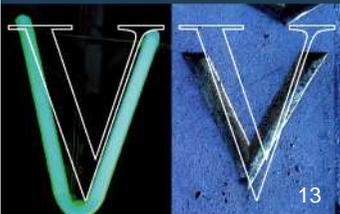
➤ **Twitter's Guidelines:**

- Discourages creation of multiple accounts; rules regarding retweeting to enter
 - Limits number of tweets/entries to one per day
 - E.g., don't encourage retweets to win
 - Recommends including @usernameMention in tweet entries so each entry will be visible in user timeline
 - Suggests including relevant "hashtag" topics in tweet entries
 - E.g., #promotion or #companyname.
- **Google:** Prohibits prize promotions on Google+



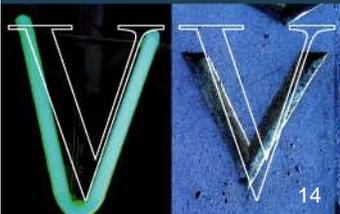
Mobile Giving

- CTIA, The Wireless Association[®] Guidelines for Mobile Giving via Wireless Carrier's Bill
 - Qualified charities may lease short codes from the CTIA operated Common Short Code Administration at a 60% reduction to published rates for commercial short code campaigns
 - Must be accredited by the BBB Wise Giving Alliance or receive three- or four-star rating from Charity Navigator.
 - Can mix communications, solicitations and mobile giving with the code as long as the campaign complies with the Mobile Marketing Association's guidelines and provide consumers with a separate opt-in for each type of activity



Mobile Giving

- **Telephone Consumer Protection Act** – prohibits using automatic dialing systems to make calls to wireless devices without express prior consent
 - Text messages included in “calls”
 - *Satterfield v. Simon & Schuster* – must have prior consent from the consumer to receive messages from that specific entity (not affiliate)
 - Prior donor or membership doesn’t count as consent
 - **FCC Rulemaking** – text messaging could require express written authorization
- **Carrier Rules and Regulations** have additional requirements for engaging in mobile giving campaigns – size of charity, years in existence, etc.



Auctions and Reverse Auctions



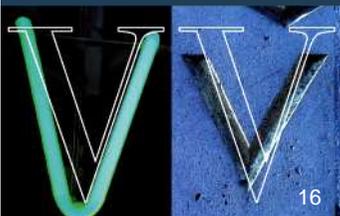
- Bid on item; may be asked to pay for each bid (money, points)
- Functions much like a sweepstakes, similar issues, need similar disclosures
- Note: US gaming policy recently relaxed
 - DOJ reversed its position on the applicability of the U.S. Wire Act to online gambling that does not involve sports betting
 - May clear the way for States to enable intra-state online gaming
 - May signal that the Federal government will consider licensing and regulation permitted online gambling
 - Indicates less strict interpretations of games of chance v. lottery issues
 - Important for “gamification”, advergaming as well



Hypothetical Fundraising Campaign

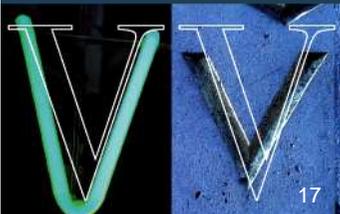
- A concert promoter and a nonprofit cancer awareness organization team up to promote the concert and raise funds for the nonprofit:
 - A giveaway drawing offering VIP concert tickets as the prize
 - 5% of the proceeds from ticket sales will go to the nonprofit
 - The giveaway and 5% donation advertised via radio, TV, and the Internet
 - At the concert, a text-to-give campaign is announced

- The following legal requirements apply:
 - Charitable raffle registration and disclosure requirements
 - Commercial co-venture laws
 - Mobile giving/marketing laws



Closing Thoughts

- When planning fundraising promotions, allow for ample lead time for compliance with any applicable laws (e.g., any registration requirements)
- Who is your target audience?
- Assess whether fundraising campaign is worthwhile in light of compliance costs/burden. Further, determine whether the campaign will not only help achieve financial goals, but will also effectively promote your organization's brand
- A highly visible fundraising campaign that was not carefully planned can lead to **PR damage, attorney general enforcement matters**, or **even class action**



Contact Information

Melissa Landau Steinman
mlsteinman@Venable.com
t 202.344.4972
Washington, DC

Mikhia E. Hawkins
mehawkins@Venable.com
t 202.344.4573
Washington, DC

www.Venable.com/nonprofits

