



# **How Nonprofits Can Raise Money and Awareness through Promotional Campaigns without Raising Legal Risk**

August 2, 2012

12:00 p.m. – 2:00 p.m.

Venable LLP

575 7<sup>th</sup> Street, NW

Washington, DC 20004

## **Moderator:**

Jeffrey S. Tenenbaum

## **Panelists:**

Melissa Landau Steinman

Kristalyn J. Loson



# **Presentation**



## How Nonprofits Can Raise Money and Awareness through Campaigns without Raising Legal Risk

Thursday, August 2, 2012  
12:30 p.m. – 2:00 p.m. EDT

Venable LLP  
Nonprofit Organizations Practice  
Washington, DC

Moderator:  
Jeffrey S. Tenenbaum, Esq.  
Panelists:  
Melissa Landau Steinman, Esq.  
Kristalyn J. Loson, Esq.



### Upcoming Venable Nonprofit Legal Events

September 13, 2012 - Litigation Basics for Nonprofits: What to Do When a Complaint or Subpoena Is Served and Other Tips and Strategies – Details Coming Soon

October 16, 2012 - Poring over Your Foundation: Making Sure Your Nonprofit's Directors & Officers Insurance Coverage Matches Your Expectations (and Vice-Versa) – Details Coming Soon



## Agenda

- Charitable Solicitation Requirements Overview
- Regulatory Update
- Social Media Implications
- Raffles / Sweepstakes
- Promotions Through Social Media
- Mobile Giving
- Auctions
- Hypothetical Campaign



## Charitable Solicitation *Current State Regulation*

- A. Charity / Nonprofit Organization
- B. Professional Solicitor
  - Professional fundraiser
  - Professional fundraising counsel / consultant
- C. Commercial Co-venturer



## Charitable Solicitation – *Charitable Organization Regulation*

- About 40 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.
  - Broad – “by any means”
  - May include grant solicitation
- **Typical Exemptions**
  - Religious organizations
  - Organizations that do not raise more than a specified amount from public (all states) if fundraising conducted by volunteers
  - Organization soliciting only within membership
  - Hospitals
  - Named individual
- **Uniform Registration Statement** – currently accepted by 38 states
  - <http://www.multistatefiling.org/>



## Charitable Solicitation – *Charitable Organization Regulation*

- Common Requirements
  - *Registration and renewal*
  - *Disclosures when soliciting (i.e. identification)*
  - *Annual reporting requirements*



## Charitable Solicitation *Internet Solicitations*

- **Charleston Principles** – set of voluntary principles drafted by the National Association of State Charity Officials (NASCO).
  - Adopted into statute by only a couple of states
  - Requires registration of:
    - (A) Charitable organizations domiciled in state
    - (B) Charitable organizations not domiciled in state when:
      - **offline activities** would be enough to assert jurisdiction (e.g. – send letter or make phone calls into state)
      - solicit donations on Internet and (1) specifically target those within that state OR (2) receive contributions from the state on a repeated and ongoing basis or a substantial basis through their website



## Charitable Solicitation *Charleston Principles – Application*

- *Example – a nonprofit, the Southwest Animal Charity, is headquartered in, has its principal office in, and holds all physical events within Texas. The organization provides funding to individuals throughout the U.S. (or grants to organizations throughout the U.S.). The organization has a website through which it accepts donations from throughout the U.S. Some of the individuals on the mailing list for emails and for U.S. mail are located outside of Texas.*
- Technically must register in:
  - Texas
  - States where sending U.S. mail / email messages
  - States from which “substantial” or “repeated and ongoing” contributions are received
- Consequences for failing to register:
  - Most of the time states will be lenient for first offense
  - BUT non-registration could be felony with fine of up to \$10,000
  - Reputational harm – consent orders



## Charitable Solicitation

### *Professional Solicitor / Professional Fundraising Consultant Regulation*

- **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*



## Charitable Solicitation

### *Commercial Co-Venture Regulation*

- **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”*
- About 25 states have laws that specifically regulate CCVs
  - *Registration*
  - *Bonding*
  - *Written Contract*
  - *Advertising Disclosures*
  - *Accounting and Recordkeeping*



## Charitable Solicitation *Regulatory Update*

- Regulators starting to take notice.
- NY AG Breast Cancer Investigation
  - October 2011 – questionnaires sent to over 40 charities / 130 for-profit companies involved in commercial co-venturer activities
  - Questions track statutory requirements – Contract? Accounting? Minimum or Maximum Contribution?
  - Also request, “television, print media, email, Twitter, Facebook, or in-store advertising”
- Other states?



## Charitable Solicitation *Social Media Implications*

- “One Big Grey Area”
- *But*, look toward same basic principles for analysis -- all the traditional rules apply





## Charitable Solicitation *Social Media Implications*

### (1) Is There a Solicitation?

- Facebook posts
  - Status – “Instead of going to see 'The Grey', donate that \$10 to the [Grand Canyon Wolf Recovery Project!](#)” (HSUS – Arizona - <https://www.facebook.com/#!/HSUSArizona/posts/313603705349384>)
  - Others' status
- Twitter Feeds
  - “Right NOW every donation to the ASPCA is DOUBLED—help twice as many animals! [#DoubleYourImpact](http://ow.ly/aoDOd)”



## Charitable Solicitation *Social Media Implications*

### (2) Is Another Party Receiving Consideration For Solicitation?

- Facebook status loans
- Re-tweets
- Charitable Platforms (crowdrise.org, donorschoose.org)
  - Is there compensation provided to site for posting or ranking?
  - Who provides the content?
  - Where does “donation” button go?



# Professional Fundraiser?

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  - Milennium Goals
  - Water
- Community**
  - Aging
  - Arts & Culture
  - Children & Youth
  - Civil Society
  - Peace
  - Public Broadcast
  - Refugees
  - Veterans
  - Women
- Environment**
  - Agriculture
  - Animal Welfare
  - Environment
  - Global Warming
- Health and Safety**
  - Blindness & Vision

**Charitable Gifts from ChangingThePresent**

- Stop Toxic Dumping** - One reporting trip - \$45
  - Fund for Global Human Rights
  - Your gift will fund one trip for an activist to help document and report ongoing abusive practices against these communities. Because of the work of Fund grantee Green Advocates, these local communities are starting to organize, resist, and generate media attention. [more](#)
- Fight Corruption** - One hour of work - \$75
  - Transparency International USA
  - Your gift will provide one hour of tool development, helping TI-USA develop and promote anti-bribery codes and implementation programs and benchmarking tools for the private sector. [more](#)
- Connect Generations** - One art performance - \$75
  - Generations United
  - Your gift will allow one performer to attend and participate in an intergenerational performance. [more](#)

ABOUT | I'M A FUNDRAISER | I'M A NONPROFIT | DONATE | CHAOS | e.g. Find Events, People, Charities |

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**WILL'S CHARITABLE LIFE** | CROWDFUNDER VERIFIED

VOTE FOR WILL | ADD TO FRIENDS | POST A COMMENT FOR WILL

**DONATE**

**\$48,085** 1 WISER

**DONATIONS**

Brian Bullock	\$30
Vince Vigil	\$30
Shawn Murray	\$30
Alex Yarnoch	\$30
Jan Abers	\$10

**1** FUNDRAISERS

WILL  
Help me send some cancer survivors to college! Donate \$19 and my friends at CFC will send you my Super Sexy Hot Tan Sunscreen.  
via Crowdfunder 1 month ago

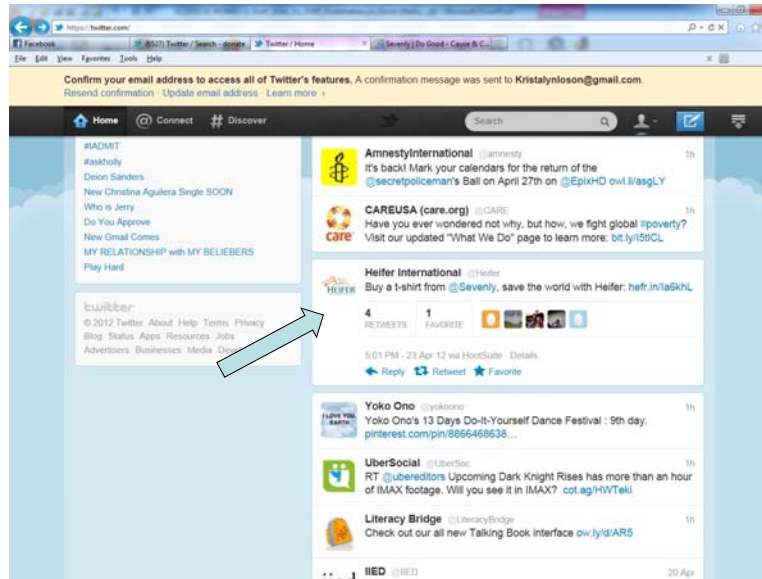
MY CROWD | MY RISE

CROWDFUNDER MEMBER SINCE APR 26, 2010  
HOME: San Diego, CA United States  
PERSONAL WEBSITE: [www.cancerforcollege.org](http://www.cancerforcollege.org)  
ROCK PAPER OR SCISSORS PAPER

STUFF ABOUT ME:  
Hi, I'm Will Ferrell  
Cancer for College is an organization started by a friend of mine that helps fund college scholarships for cancer survivors. We all know how expensive hospital visits, surgeries and treatments can be. By the time the cancer battle is over, getting back on your feet is incredibly difficult.  
Cancer for College is performing miracles and removing that barrier by

## Charitable Solicitation Social Media Implications (3) Are Goods or Services Being Offered Under Premise Will Benefit a Charity?

– “We can see it from our desks”



## Charitable Solicitation *Dealing with the Grey Area*

- Recognize the effect of going viral – potential nationwide registration
- For any charitable solicitation partner – representations and warranties
- Consider broad definition of “consideration”
- Check in with regulator



## 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, subject to registration/permit requirements for charitable gaming
- Skill and chance promotions that do not require consideration may not be subject to residency and registration requirement
- For lawful prize promotions, legal requirements for advertising disclosures and rules are extremely specific



## Endorsements and Testimonials on Social Media

**When are nonprofits and charities responsible for what social media posters/commenters and bloggers say about their charities under FTC rules re endorsements and testimonials?**

FTC revised Endorsements and Testimonials Guides in 2009 to include examples addressing social media

Bloggers or other social media marketers who have a relationship with the company about which they are blogging must disclose the relationship

Entity needs to have policy/procedures to make sure bloggers disclose and monitor compliance

"Influencer" who receives money or in-kind payments must disclose relationship

Employees blogging on their own time should also disclose their affiliation when talking about the charity

Organization cannot use a comment/blog that it knows is wrong/deceptive to say something it otherwise could not say.

Are "likes" endorsements?



"You walk the walk and talk the talk. We need someone who can also blog the blog!"



## Fundraising Raffles/ Sweepstakes

### Types of Use of Raffles

- "Buy a ticket for \$5 for a chance to win a car. All ticket proceeds benefit Kid's Charity."
- "Raise \$1,000 or more for The Food Pantry Walkathon, and you'll be entered into a raffle to win a trip to Tahiti."
- "Your ticket to The Event includes entry into raffle for several fabulous door prizes!"



## 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



## User Generated Content on Social Media

1. Prize Promotion rules/terms of use should include provisions releasing IP rights and limiting liability
  - Limit to only those rights needed—don't overreach
  - How does one obtain the signed, written release required to obtain copyright?
2. Screen and/or regularly review promotion entries, postings and comments.
  - Consider removing posted promotion entries if they pose legal risk
  - BUT, many companies no longer remove negative comments on websites due to backlash ("a screenshot is forever"), address in other ways
3. Consider using disclaimers stating that the sponsor had no hand in producing the user-generated content, and, where appropriate, stating that the content does not reflect the opinions of the sponsor
4. Use other tools such as DMCA policies, CDA to protect against infringing content



## Promotions 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 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



## User Generated Content Promotions on Social Media

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## Promotions through Social Media (cont'd)

### 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+:** Limits offering prize promotions on Google+, e.g., you cannot run a sweepstakes on your Google+ page, although you can link to one from your page.

**Pinterest:** Permits prize promotions, but "pin to win" UGC promotions may raise copyright and trademark issues.

## 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, promotions 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



## General Dot Com Disclosure Considerations

- FTC last issued online advertising disclosure guidelines 12 years ago.
- Now re-examining guidance on how to make disclosures online/on social media/using mobile devices, e.g.:
  - When are hyperlinks sufficient? Is requiring consumers to scroll down for terms ok?
  - Are there certain types of promotions that should not be attempted on certain media because their terms are simply too complex to be disclosed there?
- Could affect the requirements for charitable solicitation and promotions...stay tuned.

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## Privacy Issues

- Basic principles when collecting user data:
  - Must adhere to the promises made to consumers regarding privacy and data protection (privacy policies/other statements)
  - Must implement reasonable and appropriate measures to protect personal data against theft
  - Must disclose when will use or sell data – remember, data is an asset
- “Hot” issues:
  - Geo-location
  - Behavioral advertising and tracking
  - Children’s privacy
- What comes next in terms of regulation?

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## Federal Tax Consequences – Unrelated Business Income

- Generally, organization is not taxed on income related to tax-exempt purpose.
- UBI – income generated from regularly carried on trade or business that is not substantially related to tax-exempt purpose
  - **Exclusion for Qualified Sponsorships – IRS Code 513(j)**
    - Less than 2% fair market value of contribution
    - Acknowledgment vs. advertising
  - **Exclusion for Certain Gaming Events – IRS Code 513(a)(1) / 513(f)**
    - Income and gaming events staffed by volunteers and
    - Bingo games
- Reported on Form 990, Schedule G if more than \$15,000.



## 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) for both charity and any partners.
- Consider 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.



## Questions and Discussion

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



# **Speaker Biographies**



## Jeffrey S. Tenenbaum

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### AREAS OF PRACTICE

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 Business Transactions Tax  
 Tax Controversies  
 Tax Policy  
 Tax-Exempt Organizations  
 Wealth Planning  
 Regulatory

### INDUSTRIES

Nonprofit Organizations and Associations  
 Credit Counseling and Debt Services  
 Financial Services  
 Consumer Financial Protection Bureau Task Force

### GOVERNMENT EXPERIENCE

Legislative Assistant, United States House of Representatives

### BAR ADMISSIONS

District of Columbia

Jeffrey Tenenbaum chairs Venable's Nonprofit Organizations Practice Group. He is one of the nation's leading nonprofit attorneys, and also is an 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 trade and professional associations, charities, foundations, think tanks, credit and housing counseling agencies, 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.

Mr. Tenenbaum was the 2006 recipient of the American Bar Association's Outstanding Nonprofit Lawyer of the Year Award, and was the inaugural (2004) recipient of the *Washington Business Journal's* Top Washington Lawyers Award. He was one of only seven "Leading Lawyers" in the Not-for-Profit category in the 2012 *Legal 500* rankings, and was 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 a 2008-09 Fellow of the Bar Association of the District of Columbia and is AV Peer-Review Rated by *Martindale-Hubbell*. He 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.

### REPRESENTATIVE CLIENTS

AARP  
 American Academy of Physician Assistants  
 American Association for the Advancement of Science  
 American Association of Museums  
 American College of Radiology  
 American Institute of Architects  
 Air Conditioning Contractors of America  
 American Society for Microbiology  
 American Society for Training and Development  
 American Society of Anesthesiologists  
 American Society of Association Executives  
 American Society of Civil Engineers  
 American Society of Clinical Oncology  
 American Staffing Association  
 Associated General Contractors of America  
 Association for Healthcare Philanthropy  
 Association of Corporate Counsel  
 Association of Private Sector Colleges and Universities  
 Automotive Aftermarket Industry Association  
 Brookings Institution

## EDUCATION

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

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

## MEMBERSHIPS

American Society of Association Executives

California Society of Association Executives

New York Society of Association Executives

The College Board  
Council on Foundations  
Cruise Lines International Association  
Foundation for the Malcolm Baldrige National Quality Award  
Goodwill Industries International  
Homeownership Preservation Foundation  
Independent Insurance Agents and Brokers of America  
LeadingAge  
Lions Club International  
Money Management International  
National Association of Chain Drug Stores  
National Athletic Trainers' Association  
National Coalition for Cancer Survivorship  
National Defense Industrial Association  
National Fallen Firefighters Foundation  
National Hot Rod Association  
National Propane Gas Association  
National Quality Forum  
National Retail Federation  
National Student Clearinghouse  
National Telecommunications Cooperative Association  
The Nature Conservancy  
NeighborWorks America  
New York Blood Center  
Peterson Institute for International Economics  
Professional Liability Underwriting Society  
Project Management Institute  
Public Health Accreditation Board  
Public Relations Society of America  
Recording Industry Association of America  
Romance Writers of America  
Texas Association of School Boards  
Trust for Architectural Easements  
Volunteers of America

## HONORS

Recognized as "Leading Lawyer" in the 2012 edition of *Legal 500*, Not-For-Profit

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

Washington DC's Legal Elite, *SmartCEO Magazine*, 2011

Fellow, Bar Association of the District of Columbia, 2008-09

Recipient, American Bar Association Outstanding Nonprofit Lawyer of the Year Award, 2006

Recipient, *Washington Business Journal* Top Washington Lawyers Award, 2004

Recipient, The Center for Association Leadership Chairman's Award, 2004

Recipient, Greater Washington Society of Association Executives Chairman's Award, 1997

Legal Section Manager / Government Affairs Issues Analyst, American Society of Association Executives, 1993-95

AV® Peer-Review Rated by *Martindale-Hubbell*

Listed in *Who's Who in American Law* and *Who's Who in America*, 2005-present editions

## ACTIVITIES

Mr. Tenenbaum is an active participant in the nonprofit community who currently serves on the Editorial Advisory Board of the American Society of Association Executives' *Association Law & Policy* legal journal, the Advisory Panel of Wiley/Jossey-Bass' *Nonprofit Business Advisor* newsletter, and the ASAE Public Policy Committee. He previously served as Chairman of the *AL&P* Editorial Advisory Board and has

served on the ASAE Legal Section Council, the ASAE Association Management Company Accreditation Commission, the GWSAE Foundation Board of Trustees, the GWSAE Government and Public Affairs Advisory Council, the Federal City Club Foundation Board of Directors, and the Editorial Advisory Board of Aspen's *Nonprofit Tax & Financial Strategies* newsletter.

## PUBLICATIONS

Mr. Tenenbaum is the author of the book, *Association Tax Compliance Guide*, published by the American Society of Association Executives, and 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. He also is a contributor to *Exposed: A Legal Field Guide for Nonprofit Executives*, published by the Nonprofit Risk Management Center. In addition, he is a frequent author for ASAE and many of the other principal nonprofit industry organizations and publications, having written more than 400 articles on nonprofit legal topics.

## SPEAKING ENGAGEMENTS

Mr. Tenenbaum is a frequent lecturer for ASAE and many of the major nonprofit industry organizations, conducting over 40 speaking presentations each year, including many with top Internal Revenue Service, Federal Trade Commission, U.S. Department of Justice, Federal Communications Commission, and other federal and government officials. He served on the faculty of the ASAE Virtual Law School, and is a regular commentator on nonprofit legal issues for *The New York Times*, *The Washington Post*, *Los Angeles Times*, *The Washington Times*, *The Baltimore Sun*, *Washington Business Journal*, *Legal Times*, *Association Trends*, *CEO Update*, *Forbes Magazine*, *The Chronicle of Philanthropy*, *The NonProfit Times* and other periodicals. He also has been interviewed on nonprofit legal issues on Voice of America Business Radio and Nonprofit Spark Radio.





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 Antitrust  
 Intellectual Property Litigation  
 Intellectual Property  
 Banking and Financial Services  
 Regulation  
 Regulatory

### INDUSTRIES

Consumer Products and Services  
 Nonprofit Organizations and  
 Associations  
 Credit Counseling and Debt  
 Services  
 Consumer Financial Protection  
 Bureau Task Force

### BAR ADMISSIONS

Maryland  
 District of Columbia

### COURT ADMISSIONS

U.S. District Court for the District  
 of Columbia

Melissa Landau Steinman practices primarily in the areas of advertising and marketing, antitrust, trade regulation, consumer protection and general commercial law, litigating cases and counseling clients on matters that arise from these business concerns. She is uniquely familiar with the technology, retail and hospitality industries.

Ms. Steinman focuses her practice on assisting companies at every stage of distributing their products, reviewing advertising and marketing materials for all types of media, vetting pricing and "sales" claims, creating product warranties and advising clients on product safety issues, and addressing related intellectual property and privacy matters. She has represented clients in both private and government litigation relating to these matters, with experience handling both class action and Lanham Act matters, as well as Federal and State government investigations. Most recently, Ms. Steinman wrote and edited the "Guide to Federal and State Regulation of Advertising," a comprehensive two volume book/CD-ROM on the law of advertising and promotions.

Ms. Steinman has developed a unique specialty in consumer promotions law, with experience in the federal and state laws applicable to promotional tools such as gift cards, rebates, "free" gifts, and rewards programs. In particular, Ms. Steinman has an unusual depth of knowledge with prize promotions and Internet gaming, combining understanding of the law of promotional contests, electronic media, and federal and state regulatory law. In her gaming practice, Ms. Steinman has worked with a diverse clientele that includes some of the nation's largest consumer products and services companies, Internet gaming and gambling providers, game show producers and entertainment conglomerates, software companies, and a wide variety of charitable entities. Ms. Steinman has written extensively on the subject of sweepstakes and contests, as well as charitable promotions and commercial co-ventures: she contributed chapters to the American Bar Association's new *Consumer Protection Law Handbook*; the Promotion Marketing Association's new edition of its treatise on *Promotion Marketing Law*; and Venable's e-book, *So You Want to Be on the Internet*. She has spoken frequently on promotions and other issues and her commentary has appeared nationally in publications as prominent as the *Los Angeles Times*.

Ms. Steinman also has extensive experience working with clients on distribution antitrust issues. She represented the defendant in one of the first resale price maintenance cases filed after the Supreme Court's decision in *Leegin Creative Leather Products v. PSKS, Inc.* In addition, she has worked with numerous association clients on their antitrust policies, standards and certification programs, codes of ethics and other programs and policies. She has spoken widely on various topics relevant to associations, including antitrust, intellectual property and antitrust; associations and standard-setting; privacy and other issues.

### HONORS

U.S. District Court for the District of Maryland

U.S. Court of Appeals for the Third Circuit

U.S. Court of Appeals for the Fourth Circuit

U.S. Supreme Court

## EDUCATION

J.D., Harvard Law School, 1993

B.A., *cum laude*, Columbia University, 1990

## MEMBERSHIPS

American Bar Association

Maryland Bar Association

District of Columbia Bar Association

Promotion Marketing Association

Women's Bar Association of the District of Columbia

Recognized in the 2010 - 2012 editions of *Legal 500*, Marketing and Advertising

## ACTIVITIES

Ms. Steinman serves on the Board of the Directors of the Promotion Marketing Association, with her term starting this year; she is also active in the PMA's Legal and Government Affairs Center of Excellence. She is a member of the Antitrust Division of the American Bar Association, including the Consumer Protection and Privacy Subcommittees, the Maryland Bar Association, the District of Columbia Bar Association, and the Women's Bar Association of the District of Columbia.

## PUBLICATIONS

- July 12, 2012, Advertising News & Analysis - July 12, 2012, Advertising Alert
- July 2012, New Jersey's Gift Card Law Requires ZIP Code, Extends Abandonment, Provides "Cash Back", Advertising Alert
- April 12, 2012, Advertising News & Analysis - April 12, 2012, Advertising Alert
- April 2012, Gift Card Sellers Take Note: Groupon Settlement and New Developments in New Jersey May Affect Your Business Strategy, Advertising Alert
- February 14, 2012, How Nonprofits Can Raise Money and Awareness through Promotional Campaigns without Raising Legal Risks
- January 2012, The Download - January 2012, The Download
- January 19, 2012, Advertising News & Analysis - January 19, 2012, Advertising Alert
- October 7, 2011, Advertising News & Analysis - October 7, 2011, Advertising Alert
- September 2011, Picture is Bleak for Michaels' Crafty Ads, Advertising Alert
- September 22, 2011, Advertising News & Analysis - September 22, 2011, Advertising Alert
- August 18, 2011, Advertising News & Analysis - August 18, 2011, Advertising Alert
- January 2011, Are You Ready? New Recordkeeping Requirements if You Offer Gift Cards in New Jersey, Advertising Alert
- December 16, 2010, So You Want To Be On The Internet<sup>®</sup>
- November 19, 2010, Mobile Marketing Statutory/Regulatory Overview
- October 2010, FTC Proposes Revised Green Marketing Guides, Client Alerts
- May 2010, When Marketing Through Social Media, Legal Risks Can Go Viral
- January 2010, U.S. Department of Energy Finalizes Landmark Energy Efficiency Consent Decree, Environmental Alert
- June 11, 2009, Historic Credit Card Crackdown Law Affects Creditors, Credit Card Issuers, Gift Card Sellers, Colleges and More, Financial Services Alert
- July 1, 2008, *Promotion Marketing Law*, Sixth Edition
- January 1, 2008, *Consumer Protection Law Handbook*, American Bar Association
- December 2007, *The Guide to Federal and State Regulation of Advertising*, Volume 1
- March 2007, Prize Promotion Do's and Don'ts
- December 2006, Gift Cards: The New Plastic in Your Wallet and How the Government Regulates Them, *Electronic Retailing Magazine*
- August 15, 2006, In the Matter of Rambus: Lessons for SSOs and Their Members
- July 6, 2005, Promotions, Privacy and Postage
- September 27, 2004, Vertical Restraints and Distribution: Complying with the Antitrust Laws
- September 1, 2004, New Antitrust Protection for Standards Development Organizations
- April 2004, Legal Issues Affecting Standard-Setting: Antitrust and Intellectual Property
- November 21, 1999, So You Want To Be On The Internet<sup>®</sup>
- September 1, 1997, COMPAQ amicus brief

## SPEAKING ENGAGEMENTS

- August 2, 2012, How Nonprofits Can Raise Money and Awareness through Promotional Campaigns without Raising Legal Risk
- May 22, 2012, "Fundamentals of Marketing and Advertising Law" at RCI International
- May 4, 2012, "Sweepstakes, Promotions and Marketing Laws: Comprehension & Compliance" at the New York City Bar Center for CLE
- February 14, 2012, Legal Quick Hit: "How Nonprofits Can Raise Money and Awareness through Promotional Campaigns without Raising Legal Risks"
- February 8, 2012, "Understanding the Legal Issues in Social Networking" live webcast for the Knowledge Congress
- January 26, 2012, "Effectively Using New Promotional Techniques on Social Media and Mobile Applications Without Violating the Law," Legal Risks in Emerging Technologies Conference, hosted by Marcus Evans
- December 1, 2011, Legal Quick Hit: The Regulatory Regime for Social Media (Yes, There is One – or Rather Several): Traps for the Unwary
- November 15, 2011 - November 16, 2011, PMA's 33rd Annual Marketing Law Conference
- November 11, 2011, "Social Media Risk Management" at the Council for Resource Development's 45th Annual National Conference
- February 11, 2011, "The New Look of Gift Cards" at Sweepstakes, Promotions & Marketing Laws: Comprehension & Compliance Conference hosted by the City Bar Center for CLE
- January 26, 2011, "Social Media Law," presented by Law Seminars International (LSI)
- January 13, 2011 - January 14, 2011, "Social Media Legal Risks and Strategy," Marcus Evans conference
- November 19, 2010, PMA's 32nd Annual Marketing Law Conference
- October 26, 2010, "Marketing via Mobile Devices: Enforcement and Litigation Trends," Strafford Webinar
- September 24, 2010, 4th Annual Focus on Sweepstakes, Contests & Promotions
- April 30, 2010, "Understanding and Complying with Sweepstakes, Promotions and Marketing Laws," a New York City Bar Event
- February 12, 2010, Understanding & Complying with Sweepstakes, Promotion and Marketing Laws
- April 16, 2009, Promotional Marketing Association webinar "Gift Cards: A Legal and Strategic Marketing Perspective"
- November 20, 2008 - November 21, 2008, "More Compliance: Fees, Fines and Fear in the World of Gift Cards and Rebates" at the 30th Annual PMA Promotion Marketing Law Conference
- November 15, 2007, "For All You Do: Incentives, Rewards, and Gift Cards" at the Promotion Marketing Association 29th Annual Promotion Marketing Law Conference
- September 1, 2007, "Complying with Maryland's New Consumer Protection Law – Personal Information Protection Act" at the Maryland Retailers Association Annual Leadership Conference
- December 12, 2006 - December 13, 2006, The 28th Annual Promotion Marketing Law Conference
- August 15, 2006, Panel of Antitrust Pundits in Telebriefing on FTC's Rambus Decision
- June 30, 2005, Direct Marketing Association's DM Days New York Conference & Expo 2005
- June 12, 2005, "Intellectual Property, Antitrust and Standard-Setting" at the Practising Law Institute's Intellectual Property Antitrust 2005

- September 29, 2004, Instructional Systems Association Audioconference



## Kristalyn J. Loson

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Kristalyn J. Loson is an Associate in Venable's Regulatory Practice Group. She focuses her practice primarily on nonprofit organizations and associations, assisting charities, trade and professional associations, and other nonprofit organizations on a wide array of legal issues, including incorporation and tax-exemption applications, tax-exemption compliance and IRS audits, corporate governance, membership issues, contracts, and charitable solicitation regulation, among others.

Prior to joining Venable, Ms. Loson served as a *pro bono* staff attorney for the Guardian ad Litem Program, 20th Judicial Circuit of Florida. While earning her law degree, she also completed internships with the U.S. Department of Justice's Civil Division, and the U.S. Attorney's Office. She also served for a year as a judicial intern in the chambers of the Honorable Fern Flanagan Saddler of the Superior Court of the District of Columbia.

Prior to entering law school, Ms. Loson worked as a fundraiser for a large multi-national nonprofit organization. Through her experience in the nonprofit sector, she has gained perspective on the unique needs of these organizations, both legal and otherwise.

### AREAS OF PRACTICE

Regulatory  
Advertising and Marketing  
Tax-Exempt Organizations

### INDUSTRIES

Nonprofit Organizations and Associations  
Credit Counseling and Debt Services  
Education

### BAR ADMISSIONS

District of Columbia  
Florida

### EDUCATION

J.D., *with honors*, The George Washington University Law School, 2009

The Public Contract Law Journal, *member*

George Washington University Domestic Violence Project Clinic

B.A., *cum laude*, University of Miami, 2005

*Department of Political Science  
Honoree*

### PUBLICATIONS

- July 26, 2012, Second in Series of Hearings on Tax-Exempt Sector Held by U.S. House of Reps. Ways and Means Subcommittee
- June 26, 2012, Agreeing to Convene: Spotting and Solving the Most Common Event Contract Pitfalls
- May 9, 2012, The Top Ten Things You Need to Know about the New District of Columbia Nonprofit Corporation Act
- April 26, 2012, Social Media and Charitable Solicitation Considerations
- 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
- February 28, 2012, Charitable Solicitation and Commercial Co-Venturer Red Flags: Insights for Charities and Marketers from the NY Attorney General
- December 19, 2011, The New D.C. Nonprofit Corporation Act Takes Effect on Jan. 1, 2012: Everything You Need to Know to Comply
- December 2, 2011, Advertising News & Analysis - December 2, 2011, Advertising Alert
- 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
- November 18, 2011, The New D.C. Nonprofit Corporation Act Takes Effect on Jan. 1,

## 2012: Everything You Need to Know to Comply

- October 17, 2011, Lobbying: What Does It Mean for 501(c)(3) Organizations?
- October 17, 2011, Lobbying: What Does It Mean for Nonprofits?
- October 13, 2011, Advertising News & Analysis - October 13, 2011, Advertising Alert
- October 2011, Avoid Legal Pitfalls in Cause Related Marketing, *Electronic Retailer Magazine*
- September 26, 2011, Preventative Planning: Avoiding Common Legal Pitfalls in Hotel, Convention Center and Meetings Contracts
- September 15, 2011, Lobbying: What Does It Mean for Nonprofits?
- August 2011, Contracting for Housing Services
- August 11, 2011, Avoiding Legal Pitfalls in Cause-Related Marketing
- June 20, 2011, IRS Announces First Round of Revocations for Nonprofits that Failed to File Form 990
- April 29, 2011, Developing and Managing a Successful Fundraising Campaign
- April 29, 2011, Raising Funds, Not Eyebrows: Legal Considerations in Fundraising
- April 13, 2011, Considerations in Mergers and Asset Transfers of Credit Counseling Agencies
- October 18, 2010, Avoiding UBIT Pitfalls
- October 2010, Key Steps to Forming and Operating a Nonprofit, Tax-Exempt Charity
- June 3, 2010, A Lesson in Compliance: IRS Releases Interim Report on Nonprofit Colleges and Universities Compliance Project (Long Version)
- June 3, 2010, A Lesson in Compliance: IRS Releases Interim Report on Nonprofit Colleges and Universities Compliance Project (Short Version)
- May 7, 2010, Massive Loss of Tax Exemptions Looming
- February 5, 2010, Mortgage Assistance Relief Services Targeted in Federal Trade Commission Rulemaking, Credit Counseling Alert
- 2009, *Improving Privatization: How Federal Procurement Concepts Can Solve Lingering Problems in State Contracts for Child Welfare*, 38 Pub. Cont. L.J. 956

## SPEAKING ENGAGEMENTS

- August 2, 2012, How Nonprofits Can Raise Money and Awareness through Promotional Campaigns without Raising Legal Risk
- June 28, 2012, Featured on Cause Marketing Radio Show
- June 27, 2012, WMACCA Non-Profits & Associations Forum: "Agreeing to Convene – Spotting and Solving the Most Common Event Contract Pitfalls"
- May 3, 2012, "Hot Topics - The District of Columbia Nonprofit Corporation Act of 2010" at AFG's 10th Annual National Conference on Association Foundations & Fundraising
- April 26, 2012, "Social Media and Charitable Solicitation Considerations" at the 2012 Exempt Organizations General Counsel Conference
- April 24, 2012, "Contracting for Meeting Planning 101: Getting the Best Terms for Your Client" at The George Washington University School
- February 28, 2012, "Cover Your Meetings: Everything You Need to Know About Meetings Insurance" at DMAI's Destinations Showcase
- February 16, 2012, "Everything You Need to Know to Comply With The New D.C. Nonprofit Corporation Act" at West, Lane & Schlager Realty Advisors Applied Knowledge Lunch Series
- December 19, 2011, The New D.C. Nonprofit Corporation Act Takes Effect on Jan. 1, 2012: Everything You Need to Know to Comply
- September 26, 2011, "Preventative Planning: Avoiding Common Legal Pitfalls in Hotel, Convention Center and Meetings Contracts" at the Small Market Meetings Conference
- June 14, 2011, Legal Quick Hit: "Raising Funds without Raising Eyebrows: Legal

Considerations for Nonprofits" for the Association of Corporate Counsel's  
Nonprofit Organizations Committee

- April 29, 2011, Developing and Managing a Successful Fundraising Campaign
- October 18, 2010, "Confusing Stuff You Need to Know to Keep You and Your Chamber Out of Trouble" for the Western Association of Chamber Executives (WACE)
- September 21, 2010, "Nonprofit 101" at Howard University Business School, hosted by Delta Sigma Phi

# **Additional Information**



## AUTHORS

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## RELATED PRACTICES

Technology Transactions  
and Outsourcing

## RELATED INDUSTRIES

Nonprofit Organizations  
and Associations

## ARCHIVES

2012 2008 2004  
2011 2007 2003  
2010 2006 2002  
2009 2005

## Articles

July 2, 2012

### Online Social Media Legal Risks for Associations

Related Topic Area(s): Antitrust and Trade Regulation, Copyrights and Trademarks, Electronic Communications, Employment Law, Social Media

Incorporating the use of social media and online networking sites into an association's larger communication, membership, or marketing strategies raises a number of potential legal risks and liability issues for the association. The following is a non-exhaustive list of legal issues to consider in connection with using social networking sites to create, manage, and/or sponsor content.

- 1. It's more public than you think.** An association should always be careful about what it posts and assume that greater (not less) publication or disclosure is possible.
- 2. Avoid use of material obtained without permission and provide proper attribution for content taken from other sources.** Given the ease with which content and material can be obtained or posted online, even within social networking sites, avoiding copyright infringement will always remain a concern for associations.
- 3. Be careful with allowing others to post content.** When managing an online social network that enables the posting of content by a third party (e.g., a member), such content functionality can give rise to liability for copyright infringement, torts, or defamation. Avoid encouragement of unauthorized use or copying of third-party content, and where possible, seek the consent of the author, owner, or subject before reproduction or use.
- 4. Know your identity and role.** Monitor your interactions with other users and be sure you can verify your association's own posted material from messages or material from other sources.
- 5. Pattern behavior to take advantage of potential immunity.** The federal Digital Millennium Copyright Act of 1998 lays out certain safe harbors for "Internet service providers" that could provide protection from copyright infringement claims, and the federal Communications Decency Act of 1996 offers safe harbor protection for providers or users of interactive computer services from civil liability for defamation, invasion of privacy, negligence, and trespass claims.
- 6. Consider hyperlinks to third-party sites.** Although mere linking may not suffice to find copyright or trademark liability, an association should never frame, deep link to, or incorporate any third-party content without permission when it links to other sites or pages.
- 7. Don't misuse trademarks.** Third-party trademarks should be used by an association in its online social media with permission when possible and with extra caution when use is in a commercial context.
- 8. Be careful with sweepstakes.** An association should always seek legal counsel before implementing an online sweepstakes or contest through an online social network. There are numerous state laws and regulations that govern online contests, lotteries and sweepstakes.
- 9. Watch what you say when you market.** An association should be careful with any practice that is really advertising in disguise. There are federal and state rules and guidelines to be mindful of in this area.
- 10. Don't ignore the rights of privacy or publicity.** Privacy considerations, particularly with respect to children under the age of 13, still apply to social networking sites.
- 11. Be careful when sending unsolicited communications.** Even inside a social networking site, email and other forms of viral campaigns, particularly for commercial messages, can remain subject to laws governing unsolicited e-mail such as the federal CAN-SPAM Act of 2003.
- 12. Monitor blogs and other instant communication forums.** Govern with clear policies regarding

appropriate content and use such policies to help manage the association's responsibility and potential liability. A clear take-down policy also should exist.

**13. Protect your intellectual property and use proprietary notices.** Consider use of a ™, ® and/or © symbol in connection with more prominent placements of intellectual property and otherwise provide notices and conditions for any use of intellectual property by other users within an online social network.

**14. Guard against antitrust risks.** Social networking sites and related media can make it easy for members to let their guard down and share information that could lead to a violation of the antitrust laws. Remind members that they may not communicate via association-sponsored social networking to make an anti-competitive agreement or even to share competitively sensitive information.

**15. Don't ignore employer/employee considerations.** An association should define its role, as well as the expectations it has for its employees' behavior when they are using social networking sites for association business purposes.

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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 specific fact situations.*

## AUTHORS

Kristalyn J. Loson  
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## RELATED INDUSTRIES

Nonprofit Organizations  
and Associations

## ARCHIVES

2012 2008 2004  
2011 2007 2003  
2010 2006 2002  
2009 2005

## 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

Related Topic Area(s): Antitrust and Trade Regulation

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:

<input type="checkbox"/> product packaging	<input type="checkbox"/> in-store advertising
<input type="checkbox"/> television	<input type="checkbox"/> radio
<input type="checkbox"/> print media	<input type="checkbox"/> website (provide web address)
<input type="checkbox"/> email	<input type="checkbox"/> Facebook
<input type="checkbox"/> Twitter	<input type="checkbox"/> 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)

Yes  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 Kristalyn Loson at 202-344-4522 or at [kjloson@Venable.com](mailto:kjloson@Venable.com), or Jonathan Pompan at 202-344-4383 or at [jlpompan@Venable.com](mailto:jlpompan@Venable.com).

**Kristalyn J. Loson** is an Associate at Venable LLP in the Washington, DC office. She focuses her practice primarily on nonprofit organizations. Among other things, she represents nonprofit organizations engaged in charitable solicitation and advises for-profit companies on commercial co-venture regulation.

**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.*

## Articles

February 28, 2012

### Charitable Solicitation and Commercial Co-Venturer Red Flags: Insights for Charities and Marketers from the NY Attorney General

#### AUTHORS

Kristalyn J. Loson  
Jonathan L. Pompan

#### RELATED INDUSTRIES

Nonprofit Organizations  
and Associations

#### ARCHIVES

2012 2008 2004  
2011 2007 2003  
2010 2006 2002  
2009 2005

Related Topic Area(s): Antitrust and Trade Regulation

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. These efforts are also referred to as commercial co-ventures under New York law.

A review of the questions (redacted questionnaire available [here](#)) asked by the NY AG provides a framework for many of the issues that any charity or marketer should consider prior to entering into a cause-related marketing campaign and can help prepare a marketer or charity to respond to similar inquiry by a state regulator.

#### Overview of Questions in NY AG Questionnaire

Overall, the questionnaire for commercial entities consists of 19 questions, some with subparts. In addition to requiring written responses, several of the questions ask for documentation to be attached, such as contracts and preexisting marketing materials. The instructions provide that a separate questionnaire must be completed for each cause-related marketing campaign conducted by "the company and/or any of its subsidiaries, divisions or brands" since October 1, 2009. These questions make clear that the inquiry is not only related to the marketing of commercial co-ventures, but also go to the heart of best practices in charitable solicitation and partnerships with charities.

Predictably, many of the questions in the NY AG questionnaire track New York law on commercial co-ventures. For example, the questionnaire asks whether a written contract is in place with the charity, a requirement under New York law and in many other states. The questionnaire also asks for a listing of all charities, along with the charity's EIN, that have received a contribution or other benefit under the campaign. The NY AG could presumably use this information to cross-reference whether each charity is itself properly registered to conduct charitable solicitation. Further, the questionnaire asks whether an accounting has been provided to the charity, showing amounts due in connection with the campaign. Under New York law, an accounting is required at the end of each campaign detailing the number of items sold, the amount of each sale, and the amount to be paid to the charity.

In addition, the questionnaire drills down to the details about the marketing efforts of the campaign, asking for a copy of each "product label, advertisement, announcement, message or other marketing material" used to promote the campaign and requiring that the methods used to promote the campaign be identified, including, among others, television, print media, email, Twitter, Facebook, or in-store advertising. These questions recognize that successful cause-related marketing efforts often will be advertised through different mediums and by different parties, all of which must be in compliance with the relevant state statute.

The questionnaire also hits on items for disclosure in a cause-related marketing campaign. For example, the questionnaire asks whether there were any minimum or maximum guarantees regarding the corporation's donation to the charity. Minimum and maximum guarantees are often of interest to state regulators. Another item on the questionnaire asks whether additional action was required for the charity to receive the benefit promised to the charity, such as the consumer taking an action online or mailing in a receipt. Again, if the campaign involves additional action for the benefit to be received by the charity, marketers should consider evaluating whether this has been made clear to the reasonable consumer.

The questionnaire also focuses on the procedures in place for when the campaign is discontinued. Disposal of excess products and relabeling are issues that many marketers and charities might not discuss in the initial planning stages of the campaign, but which arise in many cause-related marketing efforts. Although most state charitable solicitation laws do not contain provisions specific to procedures that must be in place at the end of the campaign, if products with expired co-venture labeling are sold after the period of the campaign, this could be deemed to be deceptive advertising if a reasonable consumer believed that a charitable benefit would result from the purchase.

Finally, the NY AG questionnaire contains questions related to specifics of accounting procedures involved in the commercial co-venture. The questionnaire asks if a representation has been made to the public that a percentage of the proceeds will be given to a charity, and, if so, how profits or proceeds are measured. Although most state laws require only that the amount or percentage of profits or proceeds to be donated are stated in a contract, it is important that the method of calculation and whether such calculation will be made from gross or net income be discussed between the parties.

### **Conclusion**

The 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. As demonstrated by the questionnaire from this initiative, there are many issues which must be discussed when partnering with a charity in a marketing effort. A review of the NY AG questionnaire provides a good starting point for cause-related marketing compliance planning, and along with a consultation of the relevant state laws, can help ensure a successful campaign.

\* \* \* \* \*

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***Kristalyn J. Loson** is an Associate at Venable LLP in the Washington, DC office. She focuses her practice primarily on nonprofit organizations. Among other things, she represents nonprofit organizations engaged in charitable solicitation and advises for-profit companies on commercial co-venture regulation.*

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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.*

## 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

Related Topic Area(s): Antitrust and Trade Regulation

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,

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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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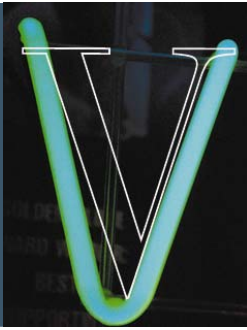
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*This article is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to a specific fact situation.*



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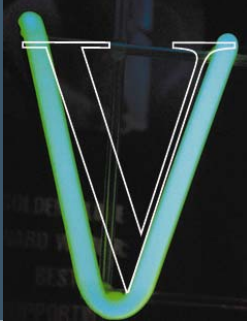
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# When Marketing Through Social Media, Legal Risks Can Go Viral

VENABLE LLP ON ONLINE MARKETING LAW

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## When Marketing Through Social Media, Legal Risks Can Go Viral

VENABLE LLP ON ONLINE MARKETING LAW

The exponential rise in popularity of social networking websites and other social media outlets such as Facebook, Twitter, LinkedIn, and individual blogs, is due in large part to their viral nature. Social networking sites are essentially self-promoting, in that users spread the word for the sites. The more quickly social networking sites grow, the more quickly they spread. The viral quality of social media makes it an appealing way for businesses to market products and services, and marketers have long recognized and tapped the potential of social media outlets. Many advertisers have conducted consumer promotions involving social media to generate attention to and participation in their promotions, thereby maximizing brand exposure. Incorporating social media into a marketing campaign is not, however, without legal risks. Companies utilizing the power of social media must be cognizant of the relevant legal issues in order to protect themselves from liability risks.

### **Trademark and Copyright Issues**

It is of the utmost importance for companies to protect their own trademarks and copyrights when using social media to promote their brands. A company's brands and other intellectual property are often nearly as valuable as the products or services that they offer. Social media's capacity to facilitate informal and impromptu communication – oftentimes on a real-time basis – can aid companies in promoting their brands and disseminating copyrighted material, but it can also facilitate third-party abuse of a business' trademarks and copyrights.

When using social media, whether via a third party outlet or a company's own social media platforms, marketers should regularly monitor the use of their trademarks and copyrights. Companies should monitor their own social media outlets as well as third-party

social media platforms to ensure that their intellectual property is not being misused by those providing content through the media outlets. Internet monitoring and screening services are available to monitor the use of your business' marks and copyrights on third-party sites, including checking social media sites for profile or user names that are identical or substantially similar to your company's name or brands. This form of business impersonation can damage a company's brand and reputation if left unchecked; such monitoring can also serve as a positive indicator of business success. Companies should consider reserving, on various social media sites, user names that match or closely resemble their trade names and marks.

Social networking sites generally have terms and conditions that prohibit trademark and copyright infringement, and many sites, such as Twitter, also have rules regarding business and/or celebrity impersonation. Twitter terms and conditions state, in relevant part:

Using a company or business name, logo, or other trademark-protected materials in a manner that may mislead or confuse others or be used for financial gain may be considered a trademark policy violation. Accounts with clear intent to mislead others will be suspended; even if there is not an explicit trademark policy violation, attempts to mislead others may result in suspension.

Twitter has specific provisions governing business or individual impersonation and name squatting. A well-known lawsuit involving allegations of impersonation on Twitter involved Tony La Russa, Manager of the St. Louis Cardinals Major League baseball team. In May 2009, La Russa sued Twitter for trademark infringement for allowing an impersonator to use La Russa's name as a Twitter profile name and post offensive "tweets" under the name. The case was eventually settled. *Anthony La Russa v. Twitter, Inc.*, Case Number CGC-09-488101 (Cal. Super. Ct., San Fran. Co., May 6, 2009).

Many social media outlets have procedures by which entities or individuals can report trademark or copyright abuse to the outlet, which may then take appropriate actions, including suspending the responsible user's account and removing infringing content. In fact, many social media companies, including Facebook, YouTube, and Twitter, provide instructions specifically for submitting a take-down notice relating to allegedly copyright infringing content, a procedure that can afford the social media outlets some immunity under the federal Digital Millennium Copyright Act (which is discussed in detail below).

In addition, companies should have terms and conditions for their own social media outlets, with provisions specifying how to properly use the company's and/or third parties' intellectual property. Marketers conducting certain types of social media marketing campaigns, particularly promotions and user-generated content campaigns, should have rules in place that include specific prohibitions regarding trademark and copyright infringement and impersonation.

## **General Legal Standards Applicable to Social Media Marketing**

The law treats advertising and marketing via social media just as it does similar practices as they are employed in the context of traditional media. The backbone of federal consumer protection law is Section 5 of the Federal Trade Commission Act, which is enforced by the Federal Trade Commission (the “FTC”) and declares that unfair or deceptive acts or practices are unlawful. Most states have statutes modeled after the FTC Act, known as “mini-FTC Acts”; many of these laws expressly provide that the mini-FTC Act should be interpreted in accordance with FTC guidance and case law. States may also (or alternatively) have general false advertising laws, or prohibitions of specific types of deceptive and misleading conduct such as advertising misleading price comparisons, rebates or sweepstakes promotions. Social media marketing campaigns must comply with these laws and their implementing regulations.

As with advertising through any channel, marketers using social media must ensure that their advertising claims are truthful and accurate and that they have substantiation for their claims before disseminating them. They must also clearly and conspicuously disclose all material information regarding an offer in their advertisements.

Companies that have relationships with third-party affiliate marketers should ensure that those affiliates comply with advertising and marketing laws in marketing the companies’ products or services through social media. Businesses should have agreements with affiliates requiring the affiliates to comply with all applicable federal, state, and local laws and regulations; it may be prudent to include specific representations and warranties by the affiliate with respect to compliance, with specific references to significant laws such as the FTC Act. The agreements should also have a provision whereby the affiliate agrees to indemnify the company (either through a mutual indemnification or otherwise) from liability arising out of the affiliate’s conduct – preferably with a provision requiring that the affiliate carry sufficient insurance to fund the indemnification should it be triggered. On a related note, confidentiality provisions and related provisions ensuring data security have become increasingly important in the current legal environment, particularly in agreements involving cross-border activities where consumer personal information is collected online. Additionally, businesses should, to the extent it is feasible, monitor the advertising and marketing practices of affiliates and review their marketing materials before they are disseminated. A company should take similar measures with respect to third parties who market through social media outlets operated by the company.

A recent lawsuit in this area is *Swift v. Zynga Game Network Inc.*, No. CV-09-5443 (N.D. Cal. Nov. 17, 2009). In November 2009, Facebook was named in a federal consumer class action suit alleging that advertisers disseminated deceptive ads through games offered on the social media site, such as *Mafia Wars* and *Farmville*. The company that offers many of the games on Facebook, Zynga Game

Network Inc. (“Zynga”), was also named in the suit. The suit alleges that third party marketers published deceptive advertisements through Zynga-produced games on Facebook, and that Facebook and Zynga received payments for the ads. The suit seeks to hold Facebook and Zynga liable for its alleged involvement in the dissemination of the advertising.

### **Complying with the Terms and Conditions of Social Media Outlets**

Social networking websites generally have terms and conditions in place that govern the use of their sites. Some sites’ terms and conditions contain provisions specifically regulating advertising and other commercial practices conducted on the site, including consumer sweepstakes, contests, and giveaways.

LinkedIn, for example, prohibits users from disseminating any unsolicited or unauthorized advertising or promotional materials. Twitter prohibits the use of the site to disseminate mass unsolicited messages (*i.e.*, “spamming”). According to Twitter’s rules, what constitutes “spamming” will evolve as the site responds to new tactics used by spammers. Twitter’s rules list several factors that the site considers in determining what conduct constitutes spamming, including whether a Twitter user has followed a large number of users in a short amount of time; whether a user’s Twitter updates consist mainly of links and not personal updates; and whether a user posts misleading links. Facebook has rules in place (discussed in detail below), which were substantially revised and updated last Fall, that specifically govern the administration and advertisement of promotions on the site.

In addition to complying with the provisions of a social networking site that are directly applicable to advertisers, when designing promotional activities, marketers should *also* take into account any rules that restrict *users’* involvement in advertising and other commercial activities on the site. A marketing campaign that leads consumers to violate a social networking site’s terms and conditions could expose the marketer to liability, damage the marketer’s standing among consumers, and lead the site to bar the marketer from conducting future marketing campaigns through the site.

Social networking sites frequently impose various other rules that restrict how a marketer can use their sites. For example, Facebook, YouTube and Twitter prohibit the uploading or posting of content that infringes a third party’s rights, including intellectual property, privacy and publicity rights.

### **Implementing Your Own Terms and Conditions**

If a marketer creates and/or administers its own social media platform, such as a blog or podcast, it should have in place terms and conditions governing use of the platform and should make the terms and conditions readily available to potential users. By providing guidelines governing the use of the site, carefully crafted terms and conditions can prevent both company employees and third parties from using the social media platform in an unlawful

manner. To some extent, such terms and conditions may also shelter companies from liability for the actions of third parties and employees. Comprehensive terms and conditions should reflect a good faith, reasonable effort to control and police third-party and employee conduct with respect to the platform. Such efforts are often taken into consideration by courts and regulators in determining a marketer's level of responsibility for the conduct of third parties and employees.

A site's terms and conditions should prohibit unlawful use of the platform, and ideally should specify particular types of unlawful conduct in addition to a broadly prohibiting illegal activity. For example, the rules should bar use of the site in a manner that is defamatory, libelous, or infringing upon the company's or a third party's intellectual property rights or right of privacy/publicity. The terms and conditions should also expressly state that the company is not responsible for content published through the platform by third parties.

### **User-Generated Content**

Oftentimes marketing campaigns involving social networking sites or other social media incorporate user-generated content into the campaigns. Whether it's a video or photo shared on a site, or messages that site users disseminate to members of network, user-generated content holds much promise as a marketing tool. Consumers who create content in connection with a marketing campaign may develop a strong connection with the promoted brand, and audiences are often drawn to the authenticity of the content and the notion that an everyday Joe may perhaps obtain some degree of fame through low-budget, amateur productions that he or she created. In addition, user-generated content comes with a relatively high degree of credibility in the eyes of consumers, particularly if the content was created by someone the consumer knows (for example, a "Tweet" between friends).

Soliciting user-generated content in connection with a marketing campaign comes with some risk of incurring legal liability for content created by an individual participating in the campaign. Incorporating user-generated content in a marketing campaign could expose the sponsor to liability for libel, copyright infringement, violation of one's right of privacy/publicity, deceptive advertising, trademark infringement, or other violations. The law affords social networking sites and marketers some limited shelter from liability stemming from user-generated content used for limited purposes, but gives marketers minimal protection for user-generated content when it is republished in connection with a promotion or other marketing campaign. Marketers can, however, take certain steps to minimize legal risks associated with campaigns that involve the dissemination of user-generated content through social media.

When conducting marketing campaigns in which participants can publish content that they created through a social media outlet, whether the outlet is administered by the marketer or a third-party, marketers should regularly monitor published content and remove or request removal of any postings that violate the marketer's rules

or the third-party's rules, or otherwise pose a legal risk. Alternatively, or pending removal of the content, marketers can post a statement disclaiming any association with the content or the content creator, and perhaps also express disapproval of the content. When practicable, marketers should screen user-generated content before it is disseminated. If, in screening content, a marketer identifies any legal issues, it should promptly take appropriate steps to address each issue.

Marketers should also have in place clear (and easily accessible) terms and conditions governing the marketing campaign, and those rules should include specific provisions addressing user-generated content. Marketers should also adopt disclaimers stating that the company had no hand in producing the user-generated content used or published in connection with the marketing campaign and, where appropriate, stating that the content does not reflect the opinions of the marketer.

To provide protection from intellectual property infringement claims by creators of user-generated content used by a marketer, the marketer should obtain the consent of participating consumers to use such content and the terms and conditions for the campaign should grant the marketer the specific right to use the content without compensating the consumer. Companies can also require that participants execute a release agreement allowing the marketer to use the participant's content. To protect against infringement claims by third parties, companies should consider either: (a) prohibiting the use of third party content altogether; (b) restricting the use of third-party content to only content that is in the public domain; or (c) permitting the use of third-party content only when the participant has provided written releases from each third party permitting the use of such content. Marketers can also find creative ways to reduce legal risks while facilitating the screening process by limiting the content that consumers can create in connection with marketing campaign – for example, by providing consumers with a selection of content that they can choose from that the marketer has previously cleared.

### **Monitoring and Screening Social Media Content**

When conducting marketing campaigns in which participants can post content that they created to a social networking site, marketers should regularly monitor the postings and remove or request removal of any postings that violate the marketer's rules or the site's rules, or otherwise pose a legal risk. Alternatively, pending removal of any content, marketers can post a statement disclaiming any association with the content or the content creator, and perhaps expressing disapproval of the content.

When practicable, marketers should screen user-generated content before it is disseminated. If, in screening content, a marketer identifies any legal issues, it should promptly take appropriate steps to address each issue.

There are companies that provide Internet monitoring and screening services, including companies that provide services focusing on social networking sites. Some of these services allow a

marketer to provide certain terms (e.g., company name) that it wants the service to search for on a regular basis, and the service will provide the search results. This allows companies to monitor their social media marketing campaigns and any content that is published regarding the company, thereby protecting its brand and limiting its liability exposure.

### **Sweepstakes, Contests, and Other Promotions**

As with any marketing campaign, conducting a promotion through social media can be an effective means of reaching a broad audience and capturing the attention of consumers through fresh, appealing, and interactive marketing formats. Like social media itself, promotions are by their very nature interactive and can thus be seamlessly integrated with social media outlets in a manner that heightens consumer interest in a marketer's brand. Promotions involving prizes incentivize consumer conduct in a manner that increases exposure to the promoters brand and, as such, are self-promoting – consumers are more likely to inform people they know about a promotion if prizes are offered. Social networking sites and other social media allow consumers to spread the word about a promotion quickly and with ease. Thus, promotions are an optimal means of exploiting the viral nature of social media.

When conducting or publicizing promotions through social media, marketers must not keep in mind both the general legal requirements governing promotions (e.g., the sweepstakes laws, the CAN-SPAM Act applicable to email marketing, privacy laws, etc.) and the applicable terms and conditions of the social media outlet being used to “spread the word” about the promotion.

### ***Facebook's Guidelines for Promotions***

On November 4, 2009, Facebook issued new Promotions Guidelines containing specific rules for conducting sweepstakes and contests on its website. These Promotions Guidelines, which supplement the site's existing Advertising Guidelines, set forth separate guidelines for administering a promotion on Facebook and for publicizing a promotion on the Facebook site. Under the rules, “administering a promotion” on Facebook means “operating any element of the promotion on Facebook or [by using] any part of the Facebook Platform” (a program that links Facebook to outside applications and websites). For example, collecting entries, conducting a drawing, judging entries, or notifying winners through Facebook constitutes administering an element of a promotion on the site. Publicizing a promotion, on the other hand, means “promoting, advertising or referencing a promotion in any way on Facebook or [through] any part of the Facebook Platform.” This includes, for example, announcing a promotion through a status update or wall post.

Under the new Promotions Guidelines, a company does not have to obtain Facebook's consent merely to publicize a promotion on the site. To *administer* a promotion on Facebook, on the other hand, a company must obtain Facebook's prior written consent and the promotion must be administered through Facebook Platform. A marketer that plans to conduct a promotion on Facebook must



submit materials to for the promotion to a Facebook Account Representative at least seven days before the start date of the promotion.

If Facebook users are allowed to enter through the site, then the promotion sponsor may allow entry only through a third-party Facebook Platform application. Entry into a promotion, whether administered or merely publicized on Facebook, cannot be conditioned upon a user providing content on the site, including posting content on a profile page, posting a status update, or uploading a photo onto a Facebook page. In contrast, a promotion sponsor may condition entry upon a user providing content through a third-party application. Further, specific disclosures regarding Facebook's non-affiliation with the promotion and the promotion sponsor's collection of data from entrants must appear adjacent to the entry field. The guidelines also require that the official rules for a promotion administered on Facebook include specific provisions, including an acknowledgment that Facebook is not affiliated with the promotion and a provision releasing the social networking site from liability. Various other requirements apply.

Other social networking sites may follow suit and establish comprehensive policies governing consumer promotions.

Marketers planning to conduct a promotion involving a social networking site should take great care to ensure that they comply with the site's terms and conditions, paying special attention to any advertising and promotion guidelines.

### **Endorsements and Testimonials in Social Media**

The FTC recently amended its *Guides Concerning the Use of Endorsements and Testimonials in Advertising* (the "Guides"), which address endorsements by consumers, experts, organizations, and celebrities in advertising. The amendments, which took effect on December 1, 2009, clarify – among other things – how the Guides apply in the context of social and other "new media".

The amendments to the Guides add examples to illustrate how the longstanding requirements that "material connections" (*e.g.*, compensation arrangements) between advertisers and consumer endorsers must be disclosed. Under the Guides, a material connection is one that consumers generally would not expect and that may affect the credibility or weight of the endorsement.

In determining whether a disclosure is required, the threshold issue is whether an endorsement was made. If a blogger was paid to blog about the marketer's product, the blogger's favorable blog posts concerning the product will likely be considered an endorsement under the Guides. If, on the other hand, a blogger makes favorable comments about a marketer's product, but was in no way incentivized by the marketer to post any blog entry about the product, then the blogger's product review would not be considered an endorsement. Further, if that consumer receives a single free sample from a marketer and writes positively about it on a personal blog or on a public message board, his or her comments are not likely to be deemed an endorsement given the lack of any

continuing relationship with that advertiser that would suggest that the consumer is disseminating a sponsored message. But in some cases, receiving free products may warrant disclosure. The fundamental question with respect to whether an endorsement was made is whether the speaker is (1) acting independently or (2) acting on behalf of the advertiser (or its agent). If the latter, the speaker's statement is an endorsement. This is also important in the expert or celebrity context, where previously compensation or a free gift might not previously have been considered to be a "material connection," but may now warrant disclosure in certain circumstances in the social media context.

A material connection certainly exists between a company and its employees. Thus, when an employee makes favorable comments through social media regarding his or her employer, or its products or services, the employee must disclose the employment relationship. If a company encourages its companies to post blog entries or otherwise make favorable statements regarding the company or its products or services, the company should develop procedures and policies that employees must comply with to avoid violating the standards reflected in the Guides. In relevant situations, employees should generally be advised to disclose their employment relationship with the company and whether they are acting on behalf of the company (or, as is often the case, whether they are simply acting on their own behalf); the company may wish to consider limiting the forums through which employees can make comments or even prohibiting altogether comments about the company or its products or services in any online forum. In short, companies encouraging employees to provide endorsements through social media channels should have adequate controls in place to avoid legal liability for their employees' statements, and even if a company does not encourage employees to make comments about the company or its products or services through social media, it should nonetheless have policies in place concerning such conduct.

The amendments to the Guides also address the issue of who is responsible for a deceptive social media endorsement. The FTC recognizes that because the advertiser does not disseminate the endorsements made in blogs or other consumer-generated media, it does not have complete control over the contents of those statements. Nonetheless, the FTC has taken the position that if the advertiser initiated the process that led to these endorsements being made – *e.g.*, by providing products to well-known bloggers or to endorsers enrolled in word of mouth marketing programs – it is potentially liable for misleading statements made by those consumers. Whether liability will be imposed in these circumstances may turn on a determination that the advertiser chose to sponsor the consumer-generated content and, therefore, established an endorser-sponsor relationship. But in determining whether a marketer should be held responsible for a third party's statements through social media, the FTC will consider the marketer's efforts to advise endorsers of their responsibilities (*e.g.*, adoption of a blogger endorsements policy), monitor bloggers' online behavior, and deal with rogue endorsers (*e.g.*, ceasing providing free product to noncompliant bloggers).

## **Privacy and Data Security Issues Concerning the Use of Social Media**

Using social media to promote one's brand, products, or services can also implicate privacy and data security issues. It is important for companies to be aware of these issues and take appropriate measures to minimize their exposure to liability related to personal data collection, use, and maintenance.

Social media companies like Facebook and Twitter generally have their own privacy policies that govern their use of consumer data and third-party conduct on the social media platform with respect to personal data. Marketers utilizing third-party social media outlets should ensure that their marketing campaigns do not encourage consumers or any other parties to engage practices that would violate the social media company's privacy policy, and marketers should also ensure that they are abiding by the policies as well. Companies that administer their own blogs and/or other social media platforms should also maintain comprehensive policies that disclose the company's data collection, use, and storage practices, and any responsibilities that third parties have as regards privacy and data security.

Operators of social media platforms must fulfill the promises they make in their privacy policies and elsewhere with respect to data security and privacy, and they must maintain reasonable personal data protection procedures. The FTC and states have targeted companies for failing to abide by their privacy policies and/or maintain adequate data security protocols.

Companies using social media in marketing campaigns should also be aware of legal and self-regulatory restrictions on privacy and data security practices as regards minors. The Children's Online Privacy Protection Act ("COPPA"), 15 U.S.C. §§ 6501-6506, and its implementing FTC regulations govern the online collection, use, and disclosure of personal information from children under 13 years of age. COPPA applies to any operator of a website or online service directed to children under 13 who collects personal information from children under 13, or who has actual knowledge that it is collecting or maintaining personal information from a child under 13. If data collection and use practices come within the scope of COPPA, the statute and its implementing regulations require the website operator to include a privacy notice on its site and make available a notice to parents regarding its information collection and use practices relating to children under 13. It also requires that the website operator obtain parental consent before collecting personal information from children under 13.

The Children's Advertising Review Unit ("CARU"), an industry-funded, self-regulatory body that reviews nationally disseminated, children-directed advertising, has guidelines concerning the collection, use, and storage of personal data from children. CARU's guidelines are consistent with COPPA and its implementing FTC regulations.

In addition, after some prodding by the FTC, leading industry associations developed the Self-Regulatory Program for Online

Behavioral Advertising in an effort to set standards for and police online “behavioral advertising,” which is the practice of tracking a consumer’s activities online (e.g., the searches the consumer has conducted, the web pages visited, and the content viewed) in order to deliver advertising targeted to the consumer’s interests. The self-regulatory program consists of seven principles that are aimed at ensuring that consumers have control over the collection of their personal information and that marketers protect consumers’ data and privacy when engaging in behavioral advertising. Companies should adhere to these principles when undertaking behavioral advertising activities using social media.

In November 2007, Facebook introduced its Beacon advertisement system, which transmitted data from external websites to Facebook for the purpose of allowing targeted advertising to Facebook users. As part of the system, certain activities on partner websites were published on a Facebook user’s news feed. In response to protests by many Facebook users, Beacon amended its user agreement policy. However, a class action lawsuit was filed against Facebook and marketers that used the Beacon service, including Blockbuster, Inc., Fandango, Inc., and Hotwire, Inc., among others, and the lawsuit was settled in September 2009. *Lane v. Facebook, Inc.*, Case No. 5:08-CV-03845-RS (N.D. Cal. Aug. 12, 2008). As part of the settlement, Facebook agreed to provide \$9.5 million, minus \$3 million for legal fees, to create a “Digital Trust Fund” dedicated to studying online privacy. Ultimately, the Beacon advertisement system was shut down, but Facebook continues to “push” the envelope with its privacy practices.

### **Legal Protections for Social Media Platforms**

There are laws that afford website owners and operators, including social networking sites, some protection against legal liability for third-party content published on the sites. Two federal statutes in particular – the Communications Decency Act (“CDA”) and the Digital Millennium Copyright Act (“DMCA”) – provide some immunity from such liability. The DMCA’s “take-down” procedures may provide a particularly valuable tool for marketers seeking to address copyright infringement without resorting to litigation.

#### ***The Communication Decency Act***

The federal Communications Decency Act (“CDA”) was enacted to provide Internet service providers and website operators broad protection from liability for content created by third parties. Section 230 of the CDA affords immunity to interactive computer service providers, which includes owners of websites such as Facebook, YouTube, and other social networking or user-generated content sites, for content posted by third-party users of the service.

The CDA does not, however, extend immunity to intellectual property laws, criminal laws, or state laws that are consistent with Section 230 of the CDA. In addition, an Internet service provider is not entitled to CDA immunity if it plays some role in the creation of the content, including by editing the content, or gives the appearance that it played such role; for example, by failing to make

clear that it is publishing content that was created by a third party. Moreover, CDA does not protect marketers that publish content through a third party's Internet service or website; accordingly, a marketer may not be sheltered from liability arising from user-generated or other content that it disseminates through a third-party social networking site.

### ***The Digital Millennium Copyright Act***

The federal Digital Millennium Copyright Act ("DMCA") generally protects Internet "service providers", a term that has been interpreted broadly to include all website owners, from all monetary and most equitable relief for copyright infringement where a third party initiated the delivery of the allegedly infringing content and the service provider did not edit or selectively disseminate the content. The DMCA provides "take down" procedures through which service providers are immune from liability if they remove or disable access to content that allegedly infringes a copyright.

To be eligible for the DMCA "safe harbors," an Internet service provider must (1) establish a policy that provides for termination of a repeat infringer's access to the Internet service; (2) designate an agent registered with the U.S. Copyright Office to receive copyright infringement notices; and (3) promptly remove allegedly infringing content upon receiving notice of the alleged infringement.

Like the CDA, the DMCA does not shield non-ISP marketers from liability for third-party content disseminated through another party's Internet service. Thus, marketers utilizing user-generated content are not protected under the DMCA with respect to copyright-infringement if the content is published through a third party's Internet service (although they may access its protections if they own the website and follow the prescribed procedures). However, even marketers using third-party websites may request that an ISP remove third-party infringing content pursuant to its DMCA takedown procedures; the "accused" party is then given a chance to respond. A judiciously used DMCA takedown request may thus be a cost-effective means of addressing intellectual property infringement issues – particularly those where the infringer is overseas and difficult to reach in the United States courts due to jurisdictional issues.

### **Employer-Employee Issues**

As discussed with respect to endorsements and testimonials above, employers should have reasonable policies and procedures in place with respect to employee use of social media to minimize exposure to liability for the statements of employees. Companies should prohibit employees from making negative comments about a competitor, and should implement controls over employees' use of social media to make favorable statements about the company or its products/services. Companies should also consider adopting policies concerning employee use of internal blogs, online news bulletins, and other internal media channels, in order to prevent internal issues that could potentially arise due to inappropriate,

confidential, or other statements or conduct by employees in connection with the use of intra-company social media platforms.

Relevant case law indicates that users of social networking sites do not have a reasonable expectation of privacy from employers with respect to information on the users' profile pages. However, an employee may have a cause of action if an employer pressures an employee to reveal a password to a protected web page. In one case, waiters at a restaurant in New Jersey started a group discussion forum on a social networking site for the purpose of voicing their complaints about the restaurant. A manager of the restaurant discovered the site and demanded the password to the group forum web page, then fired two employees in the group after reviewing the web page. The terminated employees subsequently filed suit against the restaurant. The jury found that the employees did not have a reasonable expectation of privacy in the contents of the web page and that it was reasonable to assume that information on the page would be used by their employer. However, the jury found that the restaurant violated the federal Stored Communications Act by improperly coercing an employee to divulge the password for the web page and then using the password to access the page. *Pietrylo v. Hillstone Restaurant Group*, No. 2:06-cv-05754 (D. N.J. 2008).

Companies should proceed with caution when using information gathered from social media in screening prospective employees, including information on a candidate's profile pages on social networking sites. Such information could include an individual's ethnicity, religion, marital status, or sexual orientation, each of which can form the basis for unlawful discrimination claims.

### **Retaining Records Related to Use of Social Media**

Companies using social media should retain records related to such use for a reasonable period of time in the event the records are needed in connection with a regulatory investigation or other legal proceeding. Information and communications conveyed through social media channels may become relevant to a legal or self-regulatory proceeding, and may ultimately be the subject of a subpoena or other compulsory process. Indeed, the legal action may not directly involve a company that has custody of relevant social media exchanges or information, but a regulatory, court, or other authority may nevertheless compel the company to produce the materials. Further, records related to a company's use of social media may also ultimately prove useful in supporting a company's position in a legal proceeding or in connection with a threatened proceeding.

Recent case law has imposed harsh penalties for spoliation of electronic records evidence and raised the bar for maintenance and production of electronic files such as databases, emails, and even personal data assistants in anticipation of and during litigation. Accordingly, it is important to implement sound records retention policies and procedures with respect to social media projects. Companies should consult with counsel for assistance in designing a sound policy that takes into account business requirements, current case law and relevant statutes of limitation.

\* \* \*

Social networking sites can be effective platforms for advertising and marketing endeavors. Increasingly, marketers are using such sites as a vehicle to spread the word about a product or service through advertisements, promotions and other means. But marketing campaigns utilizing social networking sites unavoidably involve various third parties – including consumers, the social media outlets, marketing affiliates and potentially other third parties. Marketers must be aware of the legal issues raised by the involvement of these parties. In particular, campaigns that leave certain components of the campaign in the hands of the sites and/or users – as when users are encouraged to disseminate their own announcements regarding the marketing campaign through a social media outlet – can carry liability risks for marketers. By structuring campaigns properly and taking other steps to minimize legal risks, marketers can cash in on the marketing opportunities that social networking sites and other social media present without leaving themselves vulnerable.

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## **DO'S AND DON'TS OF ONLINE PROMOTIONS**

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In today's increasingly competitive marketplace, consumer products and services companies are using the "new media" to structure increasingly creative and "edgy" prize promotions. The Internet is an attractive venue for consumer sweepstakes, contests and giveaways because it provides a flexible and low-cost way to attract a youthful market using techniques such as viral marketing, with a very low ramp-up time (no need to buy network ad time, radio time, etc.) Nonetheless, for every successful promotion like Goodyear's "Name the Blimp" Contest, an Internet-based contest in which the manufacturer asked the public to name one of its airships, garnering more than 150 million consumer media impressions and earning more than \$3.5 million in comparable advertising value and an Honorable Mention as the runner-up in the 2007 PR Week Awards, there are multiple failures – some merely unfortunate, others outright illegal.

Internet prize promotions are regulated under the same federal and state laws that regulate their "off-line" counterparts. At the federal level, the U.S. Department of Justice, Postal Service, Federal Communications Commission ("FCC"), and Federal Trade Commission ("FTC") all have jurisdiction over award programs and games of chance. But it is state laws regulating sweepstakes (typically termed "games of chance" or "drawings") and contests (or "games of skill") that are often the most onerous, and therefore the most important for compliance purposes. For instance, some states require advance registration and bonding, or impose highly detailed disclosure requirements when advertising prize promotions. In addition, these legal restrictions are not the same, or even necessarily consistent, from one state to another. Accordingly, a promotion should be reviewed carefully on a state-by-state basis before being offered nationwide. Internet sweepstakes must also take international laws into account, unless the Official Rules for the promotion expressly limit participation to US residents.

### ***Elements of a Prize Promotion: Avoiding an Illegal Lottery***

Federal and state laws prohibit illegal lotteries (with exceptions for state-sponsored "Lottos"), which contain three elements:

- (1) a prize or award;
- (2) an element of chance; and
- (3) consideration.

In structuring any promotion, then, the goal is to eliminate at least one of these elements. In most cases, the presence or absence of the prize component is readily apparent. An award of free or discounted merchandise or services is an example. In a sweepstakes, the "chance" aspect of the promotion will also usually be fairly obvious. Certainly a



random drawing or issuing a limited number of winning tickets or game pieces involves chance. Some less obvious examples that may satisfy the "chance" criterion include those in which: a prize is awarded to the "100th" store (or Web site) visitor on a particular day; the amount of the prize depends on the number of people who decide to participate; the prizes are of unequal value; or, a drawing is used to break a tie, or a single prize is divided between tied winners. With prize and chance present, the question becomes – is there consideration?

Consideration, which is a legal term of art, may include a fee for entry, a product purchase requirement, or simply extensive effort that must be expended to enter. The payment of money or a required purchase by the promotion participant is enough to establish the existence of consideration. It is less clear, however, what kind or amount of personal effort or participation by an entrant will constitute "consideration" for a prize or chance to enter a promotion. As a rule of thumb, a promotion will typically be deemed to require consideration if consumers are required to expend substantial time or effort to enter or participate. Moreover, requiring consumers to submit to significant future marketing promotions may be viewed as consideration.

Could Internet access constitute consideration for purposes of the federal and state lottery prohibitions? One ordinarily has to pay money to get connected to the Internet, and therefore at least indirectly, one has to pay to enter – at least according to the State of Florida circa 1997. Luckily, Florida reversed its position in a ruling in 1998, and the Congress adopted this reasoning in the Federal Internet Gambling Prohibition Act (31 U.S.C. § 5362), which expressly excludes Internet access from the definition of consideration. Those jurisdictions that do not have legislation or attorney general rulings addressing the issue may nonetheless recognize that, depending on who is sponsoring the promotion, payment for Internet access is generally flowing to an unrelated third party for a wholly unrelated service -- i.e., the consideration is not going to the sweepstakes operator – and that, in any event, the Internet is generally available free of charge at public locations (e.g., libraries). Until the issue is conclusively resolved, though, a comparatively conservative way to help reduce residual legal risk in any jurisdictions that have not adopted a conclusive position on the issue is to set up another free method for consumers to enter an Internet prize promotion, or, at a minimum, to require that participants be registered for Internet access at the start of the promotion.

An alternative that can help avoid application of federal lottery prohibitions is to structure a promotion as a contest or game of skill, rather than a game of chance. For example, essay competitions, contests for achieving the best success or results with a product or service, or the like are examples of possible games of skill. The more objective measurements that can be incorporated into a skill game, the less likely it will violate the federal (or state) anti-lottery laws. Independent judging is preferable. For instance, should a contest sponsor face a challenge, a reviewing court or agency must be persuaded that the contest is primarily dependent on, or requires a sufficient degree of skill (in some states, any element of chance should be eliminated). Thus, to better ensure

that a game is based on contestants' skill instead of chance, this type of contest should rely as much as practicable on objective measurements of success.

Sound complicated? It can be. But there are some simple steps you can take to make sure that your prize promotion is lawful and avoid disasters:

### ***Broad Guidelines For Running A Prize Promotion***

**1. Free Method of Entry.** If an advertiser chooses to promote a prize in conjunction with a sales solicitation or inducement to purchase a product or service, the advertiser must provide consumers with a free, alternative method of entry. For example, if the promotion sponsor uses a product order form (paper or electronic) that will also serve as a promotion entry, consumers must be able to enter the promotion without purchasing a product. Sweepstakes promotions cannot discriminate between purchasers and non-purchasers -- both must be entered on equal terms. One possibility is to give consumers the option of declining the product, but still entering the promotion, on the same form, and then include all of the entries in the prize drawing. If the advertiser instead chooses to keep order forms separate and simply enter the purchasers' names on a promotion entry list, then the advertiser will need to provide non-purchasing consumers with a separate, free, and reasonably available means of getting their names on that list. For instance, one could develop a second form for entry, or set up a separate email address or toll-free 800-number that consumers can use to register. Note that even if the advertiser is running a skill contest, which means that the "chance" element is eliminated and consideration may be imposed in many states, there are still a number of states that do not permit consideration in skill contests; you should consult counsel to determine whether to eliminate residents of those states from eligibility, eliminate the consideration requirement for residents of those states, or simply eliminate consideration altogether.

It is extremely important to disclose the no purchase method of entry clearly. Not long ago, Nestle was cited for a candy promotion where children were told to buy candy to see if it turned their tongues "Prankster Purple." While "no purchase necessary" language" was included in the ad, it was so small in comparison to the rest of the ad it was ineffective. Keep in mind that children are considered to be particularly vulnerable populations from a promotions perspective, with special rules imposed by a self-regulatory unit of the Better Business Bureau, the Children's Advertising Review Unit or CARU.

**2. Rules.** There should be a set of rules that promotion participants can read and understand, and which should be provided, or at least disclosed, when the promoter notifies consumers about the promotion. The rules should clearly and accurately explain who is qualified to participate, how the promoter will run the promotion and choose the winner(s), what the prize(s) will be, the value of the prize(s), and the deadline for entry. The rules should also include the odds of winning, or an estimate of the probable number

of people who will be eligible to participate. In addition, the rules should also explain the free method of entry if some entrants may also be making a purchase.

Certainly, the rules should include protections for the promotion sponsor, such as limitations on the number of entries permitted and the manner in which entries may be submitted (e.g., precluding bulk-mail entries). The promotion rules should be written carefully, because the sponsor will be legally bound to adhere to them once the promotion begins. Among the things one should consider in formulating rules are how long the promotion will run; how many prizes to award; how often to conduct drawings; whether or not to limit the number of entries permitted; whether to limit who can participate (e.g., U.S. residents, people over 18); when and how to notify consumers who win the prize(s); what to do with any unclaimed awards; how many prizes (or how many times) consumer are eligible to win; and who will judge entries).

Perhaps the most important provisions to include in the rules are limitations on liability and disclaimers of warranty, as well as – for any instant-win game – the all-important “Kraft clause,” which provides protection from liability in the event of printing or production error. The Kraft clause got its name from an instant-win game run many years ago when too many winning game pieces were distributed to the general public, creating a difficult situation, as you can imagine, for Kraft. A similar situation occurred with the Daily News Scratch 'N' Match game when the Daily News printed an erroneous winning number in the paper, leading several individuals to think they had won when in fact they had not. Although a number of law suits were filed, the Daily News has already won dismissal in several law suits based on Kraft-type clauses in its Official Rules. Thus, although litigation in the event of this type of error is nearly inevitable in today's society, well-drafted rules can provide risk protection and limit liability should something catastrophic occur.

**3. Odds of Winning.** Federal and state laws usually require that an advertiser disclose the odds of winning each prize. If it is not possible to calculate accurately the precise odds, that fact should be disclosed, along with the factors that will determine the odds (e.g., the odds of winning will depend on the number of promotion entries). When possible, however, odds disclosures should include an estimate of the number of promotion participants, explaining that the figure is an estimate and, if applicable, the basis for it. For example, one could estimate the number of people who will be qualified to participate in the promotion.

**4. Eligibility Limitations.** It is permissible, and in some circumstances desirable, to limit contestant eligibility. For example, while Canadian residents may be able to access an Internet promotion, only games of skill are permitted in Canada. And other countries' rules may vary even more. As such, it may be desirable to limit eligibility to U.S. citizens only. Other conditions of participation that might be appropriate in certain circumstances may include limitations excluding minors, persons affiliated with the sponsor, or residents of certain states; or requirements to authorize the sponsor to use winners'

names, photographs, or other materials in future promotions, to prepare a list of winners, or for other purposes. Eligibility should also be conditioned on compliance with the Official Rules. Restrictions on participation should also avoid exclusions that could expose the sponsor to charges of unlawful discrimination.

**5. Advertising and Solicitation Disclosures.** Advertisements for a prize promotion should disclose as many of the terms and conditions of the promotion as practicable.. Advertisements -- print, radio, television, or Internet -- should at a minimum state the promotion start and end dates/times, basic eligibility requirements, the odds of winning, the prizes/number and value, sponsor contact information, and how consumers may obtain a free set of complete rules. If a promotion is promoted along with a solicitation to buy products or services, the ads or solicitations must also explain either (1) how consumers can enter the promotion free of charge, or (2) an address, or local or toll-free telephone number, that consumers can contact to obtain instructions on the free method of entry. Additionally, one should not continue to run advertisements, keep the promotion on a Web site, or otherwise promote a promotion after the deadline for entry expires. Companies may, of course, also wish to consider including basic copyright and trademark information.

It is the general practice of companies that engage in nationwide sweepstakes to include a disclaimer that the promotion is "void where prohibited by law." It may also be useful to declare the promotion void in states with especially burdensome regulations (e.g., "Void In New York and Florida"), or which prohibits a particular type of promotion (e.g., "Void in Vermont," which prohibits one from requiring payment even for games of skill). However, whether or not this type of disclaimer is effective in insulating the promoter from liability (including for failure to comply with bonding and registration requirements) has never been litigated. Accordingly, at the very least, it is advisable to examine the laws of the states in which one has large numbers of existing customers.

## **6. Special State Law Considerations**

There are many variations in state law. Although not a substitute for reviewing individual states' requirements, in addition to the caveats and suggestions outlined above, following the general guidelines below should help improve the likelihood that a promotion would meet the requirements of a significant number of states' rules:

- Do not use simulated checks or invoices;
- Make disclosures in at least 10-point type; express dollar figures or values in Arabic numerals;
- Identify the geographic area covered by the promotion;
- Be sure promotion solicitations include the sponsor's full legal name, street address, and telephone number;

- Do not use contestants' names or personal information for future advertising or marketing without referencing your corporate privacy policy; follow your privacy policy at all times;
- Some states require that promotion promoters file advance registration statements with state authorities before conducting a game of chance. For example, New York and Florida both require advance registration if the value of the prize is over \$5,000.00; prize awards worth over \$500 trigger a similar requirement in Rhode Island for promotions conducted through retail outlets. Arizona law requires that contest sponsors pre-register certain games of skill. The information required in the statement varies somewhat, but generally covers the types of information that must be included in the official rules and in consumer disclosures. New York and Florida also require that promoters establish a trust or escrow account, or provide a surety bond that covers the value of the prize. Escrow/trust account funds generally can not be released without approval of a designated state official, usually after the promoter has given the state notification and information concerning the winners. There is usually also a fee for filing these statements. Certain limited exemptions to the registration requirements may apply.

These “do’s and don’ts” will go a long way towards putting you on the road towards creating a successful, lawful Internet promotion. Federal and state laws regulating sweepstakes and contests are complex, and a good advertising lawyer can assist in making sure that the promotion’s structure and advertising is lawful and creating a good set of rules. Perhaps the most important thing to remember is that the creativity and low-cost of the Internet as a medium should not be an excuse to avoid legal compliance. If anything, it should up the ante, as the reach of the Internet is incredibly broad, and legal compliance becomes all the more important when one’s promotional campaign may be virally emailed all across cyberspace. You want to make sure that your latest promotion does not become one of the “don’ts” of promotional history, and that instead you are accepting your award at next year’s PR Week.

## Articles

August 11, 2011

### Avoiding Legal Pitfalls in Cause-Related Marketing

Related Topic Area(s): Antitrust and Trade Regulation, Tax and Employee Benefits

Marketers are increasingly looking to affiliate with charities in cause-related marketing efforts, such as arrangements in which a charitable donation is built into the cost of purchase of a good or service, to both raise donations and corporate image. After two years of decline, charitable giving as a whole is increasing, according to a recent survey conducted by the *Chronicle of Philanthropy*, and marketers may be even more interested in cause-related marketing campaigns.<sup>1</sup> However, as seen by the recent class-action lawsuit filed against Lady Gaga over charity wristbands for Japanese earthquake victims,<sup>2</sup> good intentions are not enough to prevent scrutiny and legal trouble.

The suit filed against Lady Gaga (whose real name is Stefani Germanotta) alleges that in selling \$5 wristbands that say “We Pray for Japan,” Lady Gaga violated federal racketeering and consumer protection laws and engaged in unfair and deceptive advertising by stating that “all proceeds go the Japan Tsunami Relief.” According to the complaint, a class action filed by an attorney with 1-800-LAW-FIRM (a Michigan-based legal network) on behalf of consumers, this statement was misleading in that it did not account for taxes and shipping fees on its wristbands.<sup>3</sup>

While the legal merits of the claims are yet to be evaluated, this case serves as a reminder for any marketer seeking to enter a cause-related marketing relationship with a charity to pay attention to potential legal issues prior to embarking on a marketing or advertising campaign. Below we highlight a few of the key issues to be considered. We note that this article does not address federal tax requirements and considerations under the Internal Revenue Code, such as the charitable tax deductibility of donations, required charitable contribution notices and disclosures, and the taxability of income earned by the charity, among others. These are very important issues for charities, but are beyond the scope of this article.

#### Commercial Co-Venturer Registration

Currently, over 20 states regulate “commercial co-ventures,” typically defined under state law as “arrangements between 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 a charitable purpose.” While commercial co-venturer relationships come in many shapes and forms, the most common scenario involves a for-profit, taxable business using the name and logo of a charitable organization for the purpose of increasing sales of the for-profit entity’s products or services while at the same time increasing revenue to the charity.<sup>4</sup> As their popularity has increased, such arrangements have come under increased regulation and scrutiny.

In some states, the commercial entity – often referred to as the “co-venturer” – is required to register with the state prior to the marketing of the commercial co-venturer relationship and must meet requirements such as posting a bond and filing financial reports with the state. In other states in which registration may or may not be required, specific recordkeeping requirements and/or mandatory contractual terms between the organization and the commercial co-venturer may be imposed. State statutes also may specify required disclosures for advertising the good or service and typically prohibit the commercial entity from making false or misleading statements in connection with a solicitation.

States have been particularly active in enforcing commercial co-venturer statutes and charitable solicitation laws in general. The Attorney General of each state generally holds enforcement power under these statutes and fines for violations can be extremely significant. Some of these statutes also contain private rights of action, including, in some cases, allowing plaintiff’s lawyers to bring class-action lawsuits on behalf of a large class of consumers, greatly increasing the risk and stakes for the marketers and charities who become targets of those suits. Therefore, it is important that marketers embarking on campaigns with charities consider state regulation of commercial co-ventures and plan for

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meeting registration, disclosures, filings, and other applicable requirements before launching their campaigns.

### **Unfair and Deceptive Practices**

In addition to potential state registration requirements, both the Federal Trade Commission Act (the “FTC Act”) and state consumer protection statutes (often referred to as “mini-FTC Acts”) prohibit unfair and deceptive trade practices, which include misrepresentations of material facts regarding an advertised product or service as well as omissions of information that would be material to a consumer’s decision to purchase a product or service.

The FTC and state Attorneys General have collaborated on a number of actions to enforce the FTC Act and mini-FTC Acts against charities and fundraisers alleged to engage in deceptive marketing practices, including in cause-related marketing efforts. For example, the FTC has brought actions against companies alleged to have deceptively offered advertising space under the guise that it would benefit a law enforcement organization,<sup>5</sup> sellers of household goods alleged to have been manufactured by disadvantaged workers,<sup>6</sup> and a company selling children’s activity books claiming to benefit children’s hospitals.<sup>7</sup>

In one well-known example, the Georgia Attorney General investigated a Yoplait yogurt campaign designed to benefit the Breast Cancer Research Foundation where the company advertised that it would make a contribution for each lid collected without revealing the agreed-to maximum total donation of \$100,000.<sup>8</sup> This investigation concluded with General Mills, the company behind the Yoplait campaign, paying an additional \$63,000 to the Breast Cancer Research Foundation, representing the amount that would have been donated through the lid collection efforts of Georgia consumers. Although it does not appear one was initiated in this case, Georgia, like several other states, includes a private right of action for persons injured as a result of a violation of its charitable solicitation statute, and also expressly permits class-action lawsuits, adding another level of risk for a cause-related marketing campaign.

As Lady Gaga discovered, claims of certain percentages going to charity often are closely scrutinized. Therefore, marketers entering into ventures with charities should take care to look at their claims from every angle to ensure that, in seeking to increase donations to a charitable cause, consumers are not misled. Marketers also should review and make appropriate disclosures concerning applicable timeframes for campaigns and any contribution caps.

### **Relationships with Charitable Organizations**

Marketers should perform due diligence on potential partners when entering into any new commercial venture, and 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<sup>9</sup> or is found to be a “scam” organization (somewhat rare but not at all unheard of).

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 law. 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.

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The rise in popularity of cause-related marketing allows consumers another way to contribute to worthy causes and raise corporate goodwill. While there are certainly some risks involved for marketers, with appropriate attention, these risks are manageable and marketers can take proper precautions to steer clear of legal pitfalls.

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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.*

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<sup>1</sup> Holly Hall and Heather Joslyn, *Giving's Recovery Lacks Momentum Says Charities*, CHRONICLE OF PHILANTHROPY, June 26, 2011, available at <http://philanthropy.com/article/Outlook-for-Giving-in-2011-Is/128011/>.

<sup>2</sup> See *Lady Gaga Sued Over Japan Earthquake Charity Bracelets*, REUTERS, June 27, 2011, available at <http://www.reuters.com/article/2011/06/27/us-ladygaga-idUSTRE75Q57220110627>.

<sup>3</sup> See complaint in *Caitlin Demetsenare v. Stefani Germanotta et. al*, No. 2:11-CV-12753-BAF-LJM (E.D.M.I. 2011).

<sup>4</sup> See *What's in a Nonprofit's Name: Public Trust, Profit and the Potential for Public Deception; A Preliminary Multistate Report on Corporate-Commercial/Nonprofit Product Marketing and Advertising of Commercial Products* (1999), available at [http://www.oag.state.ny.us/press/reports/nonprofit/full\\_text.html](http://www.oag.state.ny.us/press/reports/nonprofit/full_text.html).

<sup>5</sup> See *FTC v. Southwest Marketing Concepts, Inc.*, Civ. No. H-97-1070 (N.D. Tex. 1997).

<sup>6</sup> See *FTC. v. Crooked Oak Investments et al.*, Civ. No. 00-1496 PHX-ROS (D. Ariz. 2000).

<sup>7</sup> See *FTC v. DPS Activity Publishing, Ltd. et al.*, Civ. No. C 03-1078C (W.D. Wash. 2003).

<sup>8</sup> See GA Secretary of State press release, available at <http://sos.georgia.gov/pressrel/pr991221.htm>.

<sup>9</sup> In the vast majority of states, the charitable organization is required to register prior to conducting solicitations or having solicitations conducted on its behalf.



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### Unrelated Business Income Tax for Nonprofits: The Basics

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#### Overview

A tax-exempt organization is generally exempt from federal corporate income tax on income derived from activities that are substantially related to the organization's tax-exempt purposes. However, a tax-exempt organization may be subject to a federal corporate income tax on income derived from unrelated trade or business activities. This is known as the Unrelated Business Income Tax ("UBIT").

#### Definitions

An "unrelated trade or business" is any activity that meets all of the following three conditions:

- The activity must be a trade or business;
- The trade or business must be regularly carried on; and
- The trade or business must not be substantially related to the purposes for which the organization was recognized as exempt from federal income tax.

An activity is considered a "trade or business" if the activity is carried on for the production of income from the sale of goods or the performance of services. Note that it is immaterial whether the activity generates a profit for purposes of determining whether the gross revenue derived from the activity is subject to UBIT. Further, if an organization engages in a substantial amount of non-exempt activities, it could potentially lose its tax-exempt status even if those activities do not generate a profit.

In determining whether an activity is "regularly carried on," the IRS will examine whether the activity is conducted often and continuously and how it is pursued. The IRS will compare these factors with the same or similar business activity of non-tax-exempt organizations. Discontinuous or periodic activities are generally not considered to be regularly carried on. However, periodic activities that are seasonal in nature will be considered to be regularly carried on if an exempt organization's periodic participation in such activities coincides with the participation of taxable businesses.

For an activity to be "substantially related" to the tax-exempt organization's exempt purposes, it must contribute importantly to the accomplishment of one or more of the organization's exempt purposes. If an activity is substantially related to the tax-exempt organization's exempt purposes, then the income from that activity will not be subject to UBIT. The organization's need to generate money to use for tax-exempt purposes is not sufficient to qualify as "substantially related."

#### Exceptions

**Subject to certain limitations, the following activities are specifically excluded from the definition of unrelated business income (the code sections in brackets represent the applicable provisions of the Internal Revenue Code where these exceptions are defined):**

- Dividends, interest, and annuity income [512(b)(1)]
- Royalties [512(b)(2)]
- Certain capital gains [512(b)(5)]
- Rents from non-debt financed real property [512(b)(3)]
- Certain research-generated income [512(b)(7), 512(b)(8), and 512(b)(9)]
- Qualified corporate sponsorship payments [513(i)]
- Qualified convention or trade show income [513(c)(3)]
- Income generated from volunteer labor [513(a)(1)]
- Income from certain bingo games [513(f)]

- Sales from donated merchandise [513(a)(3)]
- A trade or business carried on by a 501(c)(3) organization primarily for the convenience of its members, students, patients, officers, or employees [513(a)(2)]
- The exchange or rental of member and donor lists among other organizations tax-exempt under 501(c)(3) [513(h)(1)(B)]
- Distribution of low-cost items in connection with charitable solicitation [513(h)(1)(A)]
- Certain hospital services provided at or below cost [513(e)]
- Qualified public entertainment activity [513(d)(2)]
- Income from services provided under a federal license by a religious order or its educational institution [512(b)(15)]
- Qualified pole rentals by a mutual or cooperative telephone or electric company [513(g)]
- Member income of mutual or cooperative electric companies [512(b)(18)]
- Certain debt management plan services [513(j)]

### **Payment**

Organizations that generate at least \$1,000 of gross unrelated business income must file a Form 990-T, Exempt Organization Business Income Tax Return, to report unrelated business income and pay any tax due. The organization must file Form 990-T in conjunction with its annual information return (i.e., Form 990, Form 990-EZ, or Form 990-PF).

An organization may take a number of tax deductions when computing UBIT. The IRS permits a specific deduction of \$1,000. Similarly, the IRS permits deductions for net operating losses, provided that it does not take into account any amount of income or deduction that has been excluded from the unrelated business income calculation.

Organizations may take a charitable contribution deduction of up to 10 percent of the amount of unrelated business taxable income, computed without regard to the deduction for contributions. In addition, the IRS permits deductions for expenses that are “directly connected” with the carrying on of the unrelated trade or business. Note that special rules are applicable to the calculation of UBIT from advertising in periodicals.

If an organization regularly conducts two or more unrelated business activities, its unrelated business taxable income is the total of gross income from all such activities less the total allowable deductions attributable to such activities. Where the value of the income exceeds the allowable deductions, the organization must pay a tax on the net unrelated business taxable income. This tax is generally imposed at the applicable (graduated) federal corporate income tax rates. An organization must pay quarterly estimated taxes prior to its annual information return filing date if its expected tax for the year will be \$500 or more.

### **Protecting Tax-Exempt Status**

A tax-exempt organization could jeopardize its tax-exempt status if the gross revenue, net income, and/or staff time devoted to unrelated business activities is “substantial” in relation to the organization’s tax-exempt functions. To avoid jeopardizing its tax-exempt status, an organization substantially engaged in one or more unrelated business activities should consider creating one or more taxable corporate subsidiaries in which to house and carry out such activities.

Such subsidiaries are separate but affiliated organizations, generally wholly-owned by the parent tax-exempt organization. A subsidiary will pay corporate income tax on its net income. But the tax-exempt parent’s exempt status will remain. Moreover, the subsidiary can remit the after-tax profits to its parent as tax-free dividends. Note that using a pass-through entity – such as an LLC – to house unrelated business activities will not necessarily offer the same tax-related protections as a subsidiary organized as a C corporation.

### **Conclusion**

Evaluating whether a particular activity may generate UBIT requires a fact-intensive review. While this article provides an overview of UBIT and its exceptions, all entities are encouraged to carefully analyze the impact of activities on the organization’s tax-exempt status and its potential tax obligations.

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