



VENABLE

Government Investigations and Controversies

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

Wednesday, April 26, 2017, 12:30 pm – 2:00 pm ET

Venable LLP, Washington, DC

Moderator

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Upcoming Venable Nonprofit Events

Register Now

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



Topics We Will Cover

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

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

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

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

FOR RELEASE

March 30, 2016

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

Consumer Protection | Telemarketing | Charity

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

CNN

U.S. » Crime + Justice | Energy + Environment | Extreme Weather | Space + Science

Live TV • U.S.

Lawmakers to investigate disabled veterans charity

By David Fitzpatrick and Drew Griffin, CNN Special Investigations Unit

Updated 8:51 AM ET, Wed July 25, 2012

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Human fetal kidney cells were used to develop Genzyme's Pulmozyme, which helps clear thick mucus from the lungs of children with cystic fibrosis.

BSP SA/Kerry Sheehy/Photo

Fact-checking Congress's fetal tissue report

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

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

Know Your Regulator(s) and Regulatory/ Political Climate

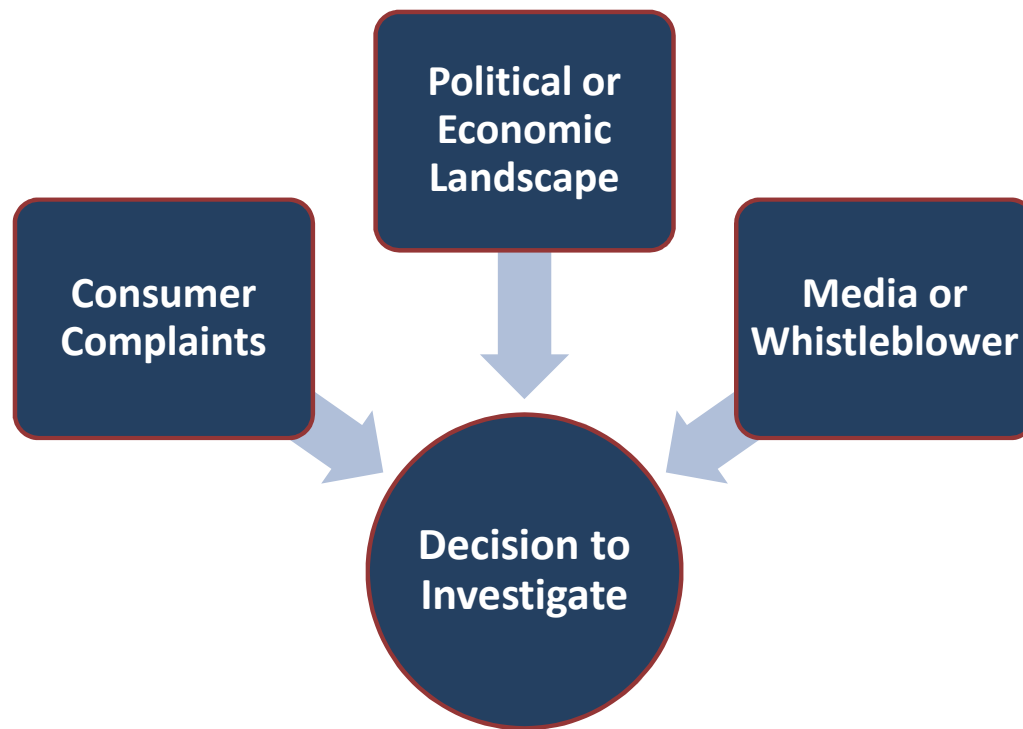


Committee on Finance





Launch of an Investigation



Two Possible Paths: Public or Non-Public

UNITED STATES OF AMERICA
Federal Trade Commission
CIVIL INVESTIGATIVE DEMAND

1. TO WHOM SERVED: [Redacted]

This demand is issued pursuant to Section 20 of the Federal Trade Commission Act, 15 U.S.C. § 207-1, in the course of an investigation to determine whether there is, has been, or may be a violation of any laws administered by the Federal Trade Commission in connection with the activities or proposed action as described in Item 2.

2. ACTION REQUIRED:
☐ You are required to appear and testify.
LOCATION OF HEARING: [Redacted] **YOUR APPEARANCE WILL BE BEFORE:** [Redacted]
DAYS, DATES AND TIMES OF HEARING OR DEPOSITION: [Redacted]

☒ You are required to produce all documents or materials in the aforesaid or include that any of your possessions, custody of, control, and to make them available at your address indicated above for inspection and copying or reproduction in the case and, upon application below.

☒ You are required to answer the interrogatories or provide the written report described on the attached schedule. Answer each interrogatory or report separately and fully in writing. Submit your answers or report in the places designated in Item 4 on or before the date specified above.

DATE AND TIME THE DOCUMENTS MUST BE AVAILABLE: [Redacted]

3. REMEDY OR REMEDYATION:
[Redacted]

4. WITNESSES: [Redacted]

5. SIGNATURE: [Redacted]

6. RETURN TO: [Redacted]

7. PETITION TO LIMIT OR QUASH: [Redacted]



UNITED STATES SENATE
COMMITTEE ON FINANCE
WASHINGTON, DC 20515-4106

May 8, 2012

President and Chief Executive Officer

One Stamford Forum
201 Tresser Boulevard
Stamford, Connecticut 06901-3431

Dear Mr. Stewart:

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

It is clear that the United States is suffering from an epidemic of accidental deaths and addiction resulting from the increased sale and use of powerful narcotic painkillers. According to CDC data, "more than 40% (14,800)" of the "36,500 drug poisoning deaths in 2008" were related to opioid-based prescription painkillers.¹ Deaths from these drugs rose more rapidly, "from about 4,000 to 14,800" between 1999 and 2008, than any other class of drugs,² killing more people than heroin and cocaine combined.³ More people in the United States now die from drugs than car accidents as a result of this new epidemic.⁴ Additionally, the CDC reports that improper "use of prescription painkillers costs health insurers up to \$72.5 billion annually in direct health care costs."⁵

In Montana, prescription drug abuse is characterized by the state's Department of Justice as an "invisible epidemic" killing at least 300 people per year and contributing to increases in

¹ Center for Disease Control, "Drug Poisoning Deaths in the United States, 1999-2008, NCHS Data Brief, No. 83, December 2011 at <http://www.cdc.gov/nchs/data/databriefs/db83.pdf>.

² ³ CDC Press Release, "Prescription painkiller overdoses at epidemic levels," November 4, 2011 at http://www.cdc.gov/media/releases/2011/s111104_pain.html.

⁴ LA Times, "Drug deaths now outnumber traffic fatalities in U.S., data show," September 17, 2011 at <http://articles.latimes.com/2011/Sep/17/US/US-drug-deaths-20110917>.

⁵ International Business Times, "Prescription Painkiller Overdoses Cost Insurers \$72.5 Billion Annually," CDC, November 8, 2011 at http://www.internationalbusiness.com/articles/1424542/2011/11/08/prescription_painkiller_overdoses_cost_insurers_72.5_billion.



Why a Communications Plan?

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

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



Responding in a Crisis – The Do's

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





Responding in a Crisis – The Don'ts


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



Steps to Take in Response to an Investigation

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

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

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



Step 1: Review CID/Subpoena/Letter

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



Step 2: Establish a Response Team

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



Guiding Principles of Crisis Management

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



Step 3: Determine Response Strategy and Potential Needs for Modification

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



Step 4: Confer with Staff Investigators

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



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

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

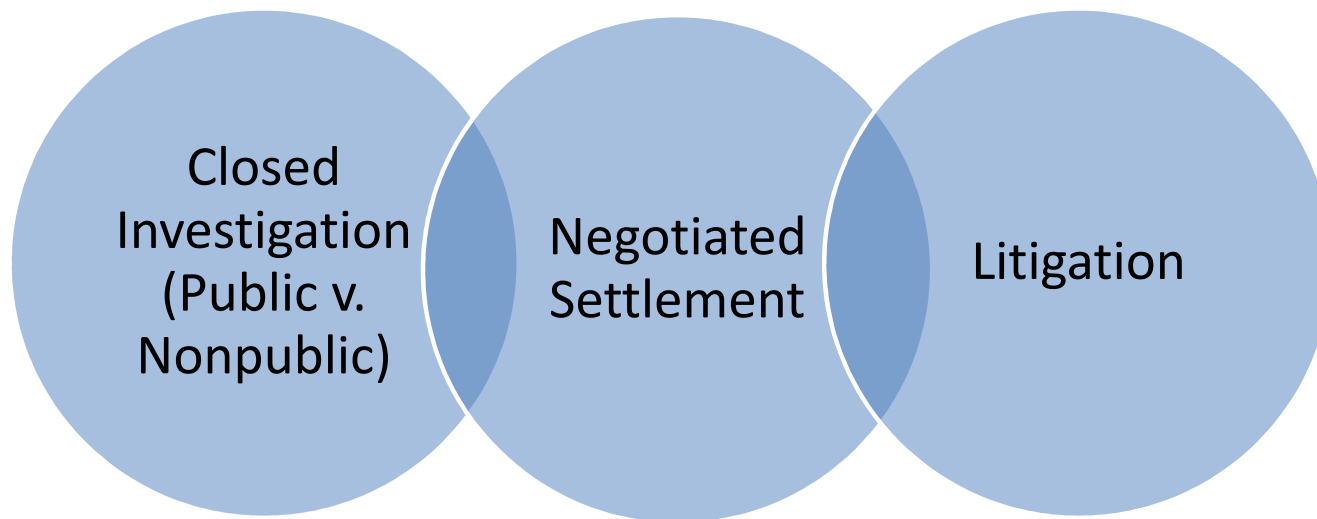


Step 6: Consider Appropriate Follow-up

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



How Does a Government Investigation Typically Resolve Itself?





Preparing the Defense





Investing in Compliance to Avoid Investigations and Maximize Outcome





Learning from Crisis

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



Questions?

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