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## Keeping Cause-Related Marketing In The Winner's Circle

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In 1983, American Express launched an innovative partnership with the Statue of Liberty restoration project, donating one cent to the project every time a customer used an American Express card. That highly successful program kick-started "cause-related marketing," which has seemingly become ubiquitous. The increased use of these campaigns – by both highly reputable corporate citizens and others – has given rise to increasing concern that consumers may be misled. This has led to extensive regulation of cause-related marketing by numerous states, as well as investigations concerning possible abuses. For example, the New York State Attorney General recently commenced an

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investigation of cause-related marketing campaigns related to breast cancer.

For businesses interested in both the considerable benefits of cause-related marketing and avoiding running afoul of state regulations and advertising pitfalls, this article provides a basic road map to common denominators and provisions in the state regulations and highlights those elements of a campaign that may trigger enforcement concerns.

### **Cause-Related Marketing Campaigns**

Cause-related marketing involves the cooperative efforts of a for-profit business and a nonprofit organization for mutual benefit. Generally speaking, the practice entails linking a company and its products or services to a charitable organization or charitable cause in an effort to both support the cause and improve the company's sales and corporate image. A typical cause-related marketing campaign might advertise that the company will contribute a certain portion of the sale price of each product purchased to a specified charity or cause. Other campaigns may promise a "flat donation" to the cause where the amount of the donation does not depend on the number of products sold. No matter what the form, cause-related marketing is attractive because it allows the for-profit company to combine social commitments with its product development. What many companies may not realize, however, is that cause-related marketing campaigns

are subject to broad state regulatory schemes that can impose significant civil penalties, fines and even criminal sanctions for non-compliance, not to mention bad public relations outcomes.

### **State Charitable Solicitation Laws And CCVs**

More than forty states have charitable solicitation laws. Generally speaking, they define and regulate the activities of "commercial co-venturers," "professional fundraisers," and "fundraising counsel." At the outset, it is important to distinguish commercial co-venturers ("CCVs"), which are the focus of this article, from professional fundraisers and fundraising counsel. CCVs, unlike professional fundraisers and fundraising counsel, are not regularly engaged in charitable fundraising for compensation. Rather, CCVs generally are for-profit companies that use the name of a charity or cause as part of a specific sales promotion, usually with the CCV representing that a donation will be made to the nonprofit organization.

Approximately twenty states specifically define and regulate CCVs. In New York, for example, a commercial co-venturer is defined as "any person who for profit is regularly and primarily engaged in trade or commerce other than in connection with the raising of funds or any other thing of value for a charitable organization and who advertises that the purchase or use of goods, services, entertainment or any other thing of value will benefit a charitable organization."<sup>1</sup> Most states have a similar definition to that of New York. The definition of a CCV does vary from state to state, however. For example, Maine has a broader definition of CCV that includes any person "who conducts a sale, performance, event or collection and sale of donated goods that is advertised in conjunction with the name of any charitable organization."<sup>2</sup> Accordingly, no promise of

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a donation is required to trigger the Maine statute.

Companies engaged in cause-marketing campaigns that are advertised throughout the country (for example, on the company website or on a Facebook page) should realize that they can be subject to the CCV regulations in all states in which consumers can access the website.

### Registration And Bonding

The statutory requirements governing CCVs vary from state to state, and a few of them require registration and the posting of bonds.

Three states – Alabama, Maine and Massachusetts – require CCVs to register and post a bond before commencing a cause-related marketing campaign.<sup>3</sup> California has a contingent registration requirement. A CCV is required to register unless: (1) the CCV enters into a written contract with the charitable organization; (2) it transfers all funds due the charitable organization; and (3) it provides a written accounting of its activity every ninety days throughout the cause-related marketing campaign.<sup>4</sup>

### Common Statutory Provisions

Although the regulations can vary from state to state, there are certain common denominators that appear in almost all statutes and certain other provisions that are found in many statutes.

*1. Written Contract with the Charitable Organization.* Most states require CCVs to enter into a written contract with the charitable organization. The statutes then provide certain mandatory terms. Examples of the mandatory terms include the following:

- Written consent from the charitable organization to use the charitable organization's name in the campaign;
- The manner in which the name of the charitable organization is to be used, including any representation to be made to the public as to the amount of the purchase price or fee that is to benefit the charitable organization;
- A provision for a final accounting to be given by the CCV to the nonprofit organization and the date when it is to be made;
- If applicable, the maximum dollar amount that the charitable organization will receive;
- The date when, and the manner in which, the benefit is to be conferred on the charitable organization.

*2. Filing of the CCV Contract.* In addition to mandatory contract terms, some states require that either the CCV or the charitable organization file with the state a

copy of the written contract. Some states require the contract to be filed within a certain period of time after the contract is signed and prior to commencement of the campaign. For example, in Alabama, the CCV must file the contract ten days after it is executed and fifteen days prior to the commencement of the campaign.<sup>5</sup> In New York, while the CCV is not required to file the contract, New York law provides every charity with a right to cancel a contract with a CCV for a period of fifteen days following the date the contract is filed with the state.<sup>6</sup> So the CCV should make sure that the contract is filed in New York, because if the contract is never filed, the charity's right to cancel might remain open indefinitely.

*3. Record Keeping.* Most states require the CCV to keep records for three years, frequently measured from the time the CCV provides an accounting to the nonprofit organization.

*4. Advertising and Disclosure Requirements.* Most states also require CCVs to include certain disclosures, either in advertisements or at the point of sale of the product, including (a) the name of the charity that will benefit; and (b) the dollar amount, or the percent of the purchase price or fee for the goods or services sold or used, that will be given to the charity.

### Enforcement Concerns And Suggestions For Best Practices

The underlying rationale of the state CCV provisions is to inform and protect the consumer and the nonprofit by promoting clarity in cause-marketing advertising campaigns. Although not guaranteeing compliance with all applicable CCV laws, the following best practices are recommended for companies whose advertisements state or suggest that the purchase of a product will benefit a charity.

Advertising should provide key elements of the promotion, allowing the con-

sumer to know the connection, if any, between a specific purchase and the amount of a donation. It is best if the key elements of the promotion are disclosed in a manner designed to be likely to come to the purchaser's attention. For example, if applicable, the amount per purchase that will be donated and the name of the charity that will receive the benefit should be disclosed. If there is a cap on the amount of the donation (i.e., up to \$50,000), that should be disclosed. Also, regulators will be concerned if the advertising campaign continues after the cap has been reached, since the consumer will not realize that a purchase will no longer benefit the charity. If the campaign consists of a "flat donation" that does not depend on the amount of products sold, the company should clearly state the amount of the donation and should not imply that a purchase will affect the amount of the donation. When the amount of the donation is based on profits, the situation is more complicated, since accounting principles are implicated. Posting additional information on a website may help.

Cause-related marketing can be a classic "win-win-win" situation. A good cause promoted by a nonprofit organization yields social benefits; the consumer feels good about making purchases that promote a worthy cause; and a company reaps public relations benefits and increased sales. Paying attention to seemingly pedestrian concerns, such as adherence to state statutes and regulations, can avoid snatching defeat from the jaws of this winning triple play and keep all players, including regulators, happy.

1 N.Y. Exec. Law § 171-a(6).

2 Me. Rev. Stat. tit. 9, § 5003(3) (emphasis added).

3 Ala. Code § 13A-9-71(h); Me. Rev. Stat. tit. 9, § 5008(1); Mass. Gen. Laws ch. 68, § 18.

4 Cal. Gov't Code § 12599.2.

5 Ala. Code § 13A-9-71(i).

6 NY Exec. Law § 174-a(1).

### About Anderson Kill & Olick, P.C.

*Anderson Kill practices law in the areas of Insurance Recovery, Anti-Counterfeiting, Antitrust, Bankruptcy, Commercial Litigation, Corporate & Securities, Employment & Labor Law, Health Reform, Intellectual Property, International Arbitration, Real Estate & Construction, Tax and Trusts & Estates. Best known for its work in insurance recovery, the firm represents policy holders only in insurance coverage disputes with no ties to insurance companies and no conflicts of interest. Clients include Fortune 1000 companies, small and medium-size businesses, government entities and nonprofits as well as personal estates. Based in New York City, the firm also has offices in Newark, NJ; Philadelphia, PA; Stamford, CT; Ventura, CA; and Washington, DC. For companies seeking to do business internationally, Anderson Kill through its membership in Interleges, a consortium of similar law firms in some 20 countries, can give service throughout the world.*