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

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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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