

Legal Pitfalls To Avoid In Social Cause Marketing Campaigns

September 21, 2018

Social cause marketing, where a business teams up with a charity to promote a product or a charitable cause, has become increasingly popular over the last few years. As the holiday season approaches these types of campaigns become more visible across all types of media, including television, print and the internet. A social cause marketing campaign often looks like the following:

For every book you buy from Books R Us we will donate \$1 to the local library.

These campaigns can take many different forms or names such as cause-related campaigns, charitable cause marketing, commercial co-ventures, joint ventures, social impact advertising, charitable sales promotion, etc. One of the reasons these campaigns are becoming more common is because they can provide tremendous benefits to both the business and the charity — a business could be seen as giving back to the community while increasing its sales, while a charity receives increased exposure to its charitable mission while increasing fundraising. However, if these campaigns are not done properly it could lead to civil and criminal penalties, taxes, and bad publicity for all parties involved, including the principals of the organizations.

Social cause marketing generally traces its origins back to 1983 to the Statue of Liberty Restoration campaign where American Express offered to contribute one cent for each card transaction to the restoration of the Statue of Liberty. The campaign ended up raising \$1.7 million to help restore the Statue of Liberty and Ellis Island. More recently, one of the best-known social cause marketing campaigns is with Newman's Own Inc., and the Newman Foundation. Newman's Own donates 100 percent of its profits to charity, and, according to its website, has donated over \$500 million to charities through the Newman Foundation.[1]

While much time can be devoted to organizing a social cause marketing campaign, regulations governing these types of advertising campaigns are often overlooked, particularly state charitable registration regulations. Approximately half of the states in the U.S. have regulations covering social cause marketing. These regulations range from requiring a business to notify the state about a campaign to requiring a business to register with the state, post a bond and report the results of the campaign back to the state. These state regulations often are referred to as "commercial co-venturer" regulations and can apply to both the business and the charity.

While each state's regulations vary, there are many common requirements between them. The regulations generally start with a definition of commercial co-venturer. Massachusetts has one of the more restrictive state regulations, defining a commercial co-venturer broadly as

any person who for profit or other commercial consideration, conducts, produces, promotes, underwrites, arranges or sponsors a performance, event, or sale to the public of a good or service which is advertised in conjunction with the name of any charitable organization or as benefiting to any extent any charitable purpose.[2]

Accordingly, if a business advertises in Massachusetts that a portion of a sale will go to a charity or support a charitable cause, that business would be considered a commercial co-venturer, subject to certain rules and regulations in the Massachusetts charitable regulations. Businesses that include the "name of any charitable organization" in an advertisement could also fall within the definition of a commercial co-venturer in Massachusetts even if no promise is made to donate a portion of any sale to charity. Conceivably just indicating that a business is a "proud sponsor of XYZ Charity" could cause that business and advertisement to be classified as a commercial co-venture.

What if a company just indicates it will donate 5 percent of its profits to charitable purposes, or that it supports local charities, without naming a specific charity? Would that rise to a level of a commercial co-venturer? In some states it may, but in other states it is a gray area.

Generally, states that regulate commercial co-venturers require the commercial co-venturer to have a contract with the charity before the social cause marketing campaign begins. The contracts are generally required to include the name of the charity, whether there is a minimum or maximum donation amount guaranteed and the length of time of the campaign. Prior to starting a campaign each state's specific requirements should be reviewed since each may vary as to the content, timing, filing requirements and filing fees. Many states require some sort of reporting to the charity and/or the state after the campaign is complete. Some states also require the charity to have the ability to back out of the contract within a certain number of days after the signing.

Massachusetts requires both the charity and the business to register with the Office of the Attorney General annually. As part of the registration process the business is required to file with the state the signed contract with the charity. Massachusetts requires the contract to include "(1) a statement of the charitable purposes to be described in the solicitation; and (2) a statement of the guaranteed minimum percentage of the gross receipts from fund-raising which will be utilized exclusively for the charitable purposes described in the solicitation."^[3]

Massachusetts is one of two states — Alabama is the other state — that also requires the business to have a bond with the state, in the amount of \$25,000. The bond provides some protection for the state in case of any "malfeasance or misfeasance" in the conduct of the commercial co-venture. In such an instance the bond would be forfeited to the state.

Finally, the content of the advertisements themselves may be regulated by the state's charitable regulations. Some states require commercial co-venture advertisements to include, among other requirements, the name and contact information for the charity and details regarding any minimum or maximum amount of donations that will be made through the campaign.

Other Regulations Applicable to Social Cause Marketing Campaigns

Depending on the content of the campaign, other regulations besides state charitable regulations may also apply. The Federal Trade Commission regulates certain advertising, and some states truth in advertising laws and consumer protection laws could also apply. Generally, advertisements should not be deceptive. If a social cause marketing campaign says it will donate a certain amount of money to a charity as part of a promotion and it does not do so, the business could have exposure under various regulations.

The Better Business Bureau's Wise Giving Alliance Standards for Accountability provides that any cause-related marketing campaign "[c]learly disclose how the charity benefits from the sale of products or services... [including] (a) the actual or anticipated portion of the purchase price that will benefit the charity... (b) the duration of the campaign..., [and] (c) any maximum or guaranteed minimum contribution amount."^[4] While not regulatory in nature, many charities rely on BBB accreditation and should be aware that a social cause marketing campaign could have implications on accreditation if not done properly.

Special Considerations for the Charity

Often overlooked in the process are the charity's potential risks if proper due diligence is not performed prior to commencement of the social cause marketing campaign. If a charity views a social cause marketing campaign as just "free money" for the charity it could overlook potential red flags. A charity's most valuable asset may be its name. A social cause marketing campaign generally allows a for-profit business to leverage a charity's name for commercial purposes. A charity's board generally has a fiduciary responsibility to make sure its assets are used for charitable purposes. Before entering into a social cause marketing campaign, a charity should at a minimum confirm there is no conflict between the charity's mission and the product being sold. For instance, a charity that is looking to prevent or cure diabetes may not want to team up with a fast-food chain restaurant in a social cause marketing campaign!

Charities should also not overlook either general contract principles or general nonprofit principles when entering

into a commercial co-venture contract. The contract should cover issues such as trademark ownership and licensing as well as general indemnification provisions. The campaign should also not confer an impermissible private benefit on the business or any individual. If the business is disproportionately benefiting from the campaign there could be private benefit concerns under the tax code and regulations.

Additionally, if the campaign is not structured properly it could create unrelated business taxable income for the charity. If a charity receives income that is (1) from an activity that constitutes a trade or business, (2) is regularly carried on and (3) is not substantially related to the charity's exempt purpose, the income could be subject to tax.[5] If a charity is actively involved in organizing or promoting the social cause marketing campaign there is a risk the funds raised through the campaign could be considered UBTI, taxable income to the charity. Some contracts may try to avoid UBTI treatment by classifying the payments as royalty payments. Regardless of the classification in the contract, if a charity is concerned with UBTI it may be prudent to limit its active participation with the organization and promotion of the campaign.

Issues to Consider for Multistate Campaigns

National and internet-based social cause marketing campaigns create an added complexity regarding compliance with commercial co-venturer regulations. If the campaign is national, what states do the charity and business have to register in? Whether or not a national or internet based campaign is subject to a state's commercial co-venturer regulations is a gray area in many state laws. Most state charitable regulations do not contemplate internet campaigns, but that does not mean an internet campaign can't trigger state filing requirements.

Generally, for a company or a charity to be subjected to a state's laws there has to be some nexus to the state. Charities and business without nationwide locations should determine whether the social cause marketing campaign could expand the jurisdictions that they are required to register in.

A closing word of caution — if not done properly, a social cause marketing campaign could create bad publicity for the for-profit business. As an example, Yoplait ran a social cause marketing campaign in 1999 where for every lid returned 50 cents would be donated to a certain nonprofit. Unfortunately the lids failed to mention that the campaign had a maximum donation amount of \$100,000. The Georgia Attorney General's office investigated after a complaint and determined that 9.4 million lids were returned as part of the promotion. Yoplait's owners ended up making an extra donation to settle the complaint.

Compliance with state charitable regulations is not complicated although it could be time consuming. Both businesses and charities should carefully review state requirements as part of any social cause marketing campaign.

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[1] See www.newmansownfoundation.org

[2] MGL ch. 68 §18.

[3] MGL ch. 68 §22.

[4] BBB Wise Giving Alliance (available at <http://www.give.org/for-charities/How-We-Accredit-Charities/> (last viewed, September 16, 2018).

[5] See generally, 26 USC §512 and 26 USC §513

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