

Legal and Regulatory Framework for Nonprofits

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I. Legal and Regulatory Framework

A. Legal rules

More than 40 states have charitable solicitation laws.

They generally define and regulate "commercial co-venturers," "fundraising counsel," "professional fund-raisers/paid solicitors," "solicitations" and "contributions" (the terminology varies from state to state, but these labels are the ones used most often).

At the end of these materials are tables of relevant state laws. The following is a summary of key provisions of the typical statute. The table and this outline offer only a summary and should not be relied upon for legal guidance on a specific promotion. Consult counsel for legal advice or clearance for particular promotions.

1. Commercial co-venturer

- a) Defined: Generally, a commercial co-venturer is a person regularly and primarily engaged in commerce (other than in connection with raising funds for charities) who conducts a "charitable sales promotion." Approximately twenty states regulate commercial co-venture promotions.

A "charitable sales promotion" is an advertising or sales campaign, conducted by a charitable co-venturer, which represents that the purchase or use of goods or services offered by the commercial co-venturer will benefit a charitable organization or purpose.

Note, however, that definitions vary from state to state. For example, Massachusetts includes in its definition of a commercial co-venturer any person who promotes the sale of any good or service which is advertised in conjunction with the name of any charity.

- b) Legal requirements: Generally,
- i. There must be a written contract between the charitable organization and the commercial co-venturer.
 - ii. The charitable organization must file a copy of the contract prior to the charitable sales promotion (Note: the charity, not the commercial co-venturer, frequently must file the contract).
 - iii. Typically, no registration and no bonding are required of the commercial co-venturer. There are some exceptions (Alabama, Hawaii, Illinois, Massachusetts, Mississippi & South Carolina).
 - iv. The commercial co-venturer must keep a copy of its final accounting.
 - v. Sometimes the state requires that certain provisions be included in the contract (*e.g.*, Connecticut requires the contract to describe the goods or services to be offered to the public, the geographic area of the promotion, the beginning and ending dates, the manner in which the charitable organization's name will be used, provisions for final accounting by the commercial co-venturer, and the date and manner in which the charitable organization will receive its benefit).
 - vi. Some states require disclosures in advertising.

About a dozen states require ads to disclose the expected portion of the sales price, percentage of gross proceeds, or other consideration the charity is to receive. Many states require this disclosure on a per-unit basis – for example, "\$1.00 per box" or "5% of the purchase price."

Massachusetts requires the same, plus disclosure of the name, address and telephone number of the charity (or the co-venturer if no specific charity is involved); a description of how the sums raised will be used; and a statement that the effort is being conducted by a "paid fund-raiser."

In 2012 New York issued a set of "Best Practices" guidelines with recommended approaches for many common situations, including where a maximum or minimum amount applies and how to help avoid misleading consumers as to whether their purchases (or other invited actions) are likely to count in various circumstances. https://www.charitiesnys.com/cause_marketing.html

- c) Scope: If a charitable solicitation law is going to apply to a cause-related promotion, it will most often be through the provisions governing commercial co-venturers. States that do not have commercial co-venturer laws may try to reach cause-related promotions through other stricter provisions regulating "fundraising counsel," or "professional fund-raisers." Illinois, for example, uses its "Charitable Trusts" Law to regulate commercial co-venturers. Whether a state can effectively apply an alternate set of laws depends on the language of its statute and the structure of the promotion in question. Generally, it would appear difficult to stretch these laws to cover most ordinary commercial co-venture offers. Problems are most likely to arise where the offer appears to solicit a contribution from the consumer.
2. Professional fund-raiser/paid solicitor
 - a) Defined: Generally, a person (other than a regular employee of a charitable organization) who for compensation or other consideration solicits contributions for a charitable organization, or who employs someone else to solicit contributions for compensation. More than 40 states regulate professional fund-raisers and/or paid solicitors.
 - b) Legal requirements: Generally, a professional fund-raiser or paid solicitor must register annually, post a bond, submit a copy of a written contract with the charitable organization prior to any campaign (along with campaign information and copies of campaign literature), maintain financial information, and file reports with the state.
 - c) Disclosures: Some states require disclosures prior to, or as part of, any solicitation (including ads, which often constitute "solicitations" and which may include commercial co-venture ads). Florida, for example, requires professional solicitors to disclose their corporate name, the legal name of the individual actually making the solicitation, the name and state of the principal place of business of the charity, a description of how the proceeds will be used, a statement that a copy of the official registration and financial information of the charity may be obtained by calling a toll-free number, the percentage of the gross that the charity will receive (this particular disclosure requirement is probably unconstitutional under *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988)), the amount that can be deducted from taxes as a charitable contribution, and other disclosures.

3. Fundraising counsel

- a) Defined: Generally a person, who, for compensation, manages, advises or consults with respect to the solicitation of contributions by a charitable organization. Approximately forty states regulate fundraising counsel.
 - i. Does not include a paid solicitor/professional fund-raiser, and does not include a regular employee of a charitable organization.
 - ii. Definition doesn't vary much from state to state.
- b) Legal requirements: Generally, fundraising counsel must have a written contract with the charity, file the contract prior to performing material services, annual) register and (sometimes) post a bond, and account in writing to the charity for income and expenses after a campaign.

4. Solicitation

- a) Defined: Usually very broadly. Connecticut is typical:

"[A]ny request directly or indirectly for money, credit, property, financial assistance or other thing of any kind or value on the plea or representation that such money, credit, property, financial assistance or other thing of any kind or value is to be used for a charitable purpose or to benefit a charitable organization."
- b) Sometimes, the statutes identify specific examples of solicitation. Connecticut again:

"Solicit" and "solicitation" shall include, but shall not be limited to, the following methods of requesting or securing such money, credit, property, financial assistance or other thing of value: (A) Any oral or written request; (B) any announcement to the press, over the radio or television or by telephone or telegraph concerning an appeal or campaign by or for any charitable organization or purpose; (C) the distribution, circulation, posting or publishing of any handbill, written advertisement, or other publication; (D) the sale of, offer or attempt to sell, any advertisement, advertising space, book, card, tag, coupon, device, magazine, membership, merchandise, subscription, flower, ticket, candy, cookies or other tangible item in connection with an appeal made for any charitable organization or purpose, or where the name of any charitable organization is used or referred to in any such appeal as an inducement or reason for making any such sale, or when or where in connection with any such sale, any statement is made that the whole or any part of the proceeds from any such sale is to be used for any charitable purpose or benefit any charitable organization. A solicitation shall be deemed to have taken place whether or not the person making the same receives any contribution."

5. Charity Registration

- a) The definition of "solicitation" is broad enough in many states to encompass commercial co-venture offers. As a result, when a commercial co-venturer makes a nationwide offer to consumers, many states could argue that "solicitations" are being made to their citizens on the charity's behalf, and, therefore, that the charity is required to register with the state even though the charity may have no contact with the state other than the circulation of the co-venture offer in the stream of interstate commerce. There is no clear precedent insulating the charity from the potential duty

to register in multiple states. *Cf. American Target Advertising, Inc. v. Giani*, 199 F.3d 1241, 1254-1255 (10th Cir. 2000) (registration duty for out-of-state professional fundraiser held not to violate the Commerce Clause).

- b) As a practical matter, unless the charity falls within a generally exempt category (*e.g.*, religious institutions and accredited educational institutions) or is already registered nationwide (many large charities routinely register in all states to cover their regular fund-raising activities), the charity should be prepared to register in *at least* those states where the co-venturer must register, and possibly more. A co-venturer should discuss these issues with the charity in advance to avoid surprises and to develop a strategy regarding registration.
- c) If a corporation uses its own foundation as the benefiting charity (which is usually fine to do), the foundation may then need to register nationwide. Be sure to consider this cost in your planning.

B. Other "regulations" and standards

1. Better Business Bureau

- a) Promulgates voluntary standards to promote ethical practices.
- b) Standards require charities to ensure that solicitations in conjunction with the sale of goods, services or admissions identify at the point of solicitation (a) the benefiting organization, (b) a source from which written information is available and (c) the actual or anticipated portion of the sales or admission price to benefit the charitable organization or cause.

2. TV networks

Have no formal standards for advertising of cause-related promotions. But they do pay attention. For example, ABC requires beginning and end dates of promotion, name of organization to be benefited, and amount of benefit to be given.

C. Proposed Multistate Consumer Law Guidance Principles

In 1999, the Attorneys General in 16 states plus the District of Columbia proposed six Guidelines. The proposals were made in response to perceived abuse of charity names in advertisements for commercial products. The Guidelines do not have the force of law. They reflect a set of principles to guide the analysis whether a particular promotion. The Guidelines are:

- 1. Both the corporate sponsor and the nonprofit organization engaged in advertising a commercial product must satisfy all applicable legal standards, including consumer laws prohibiting false advertising, unfair and/or deceptive trade practices and consumer fraud.
- 2. Advertisements for commercial products must not misrepresent that a nonprofit organization has endorsed the advertised product. If such an advertisement uses a nonprofit organization's name and logo, and the nonprofit has not in fact endorsed the advertised product, the advertisement must clearly and conspicuously disclose that the nonprofit organization has not endorsed or recommended the product.

3. Advertisements for commercial products using the name or logo of a nonprofit must avoid making express or implied claims that the advertised product is superior, unless the claim is true and substantiated, and the nonprofit has determined the advertised product to be superior. If the nonprofit has not determined the advertised product to be superior, such an advertisement must clearly and conspicuously disclose that fact.
4. Advertisements for commercial products using a nonprofit's name and logo shall disclose clearly and conspicuously that the commercial sponsor has paid for the use of the nonprofit's name and logo.
5. Advertisements arising from a corporate-nonprofit arrangement shall not mislead, deceive or confuse the public about the effect of consumers' purchasing decisions on charitable contributions by the consumer or the commercial sponsor.
6. Nonprofits should avoid entering into exclusive relationships with commercial sponsors for the marketing of commercial products. In the case where an exclusive arrangement does exist, product advertising using a nonprofit's name or logo shall clearly and conspicuously disclose, if that is the case, that the relationship between the commercial sponsor and the nonprofit is exclusive in nature.

II. How the Laws Apply (Examples)

A. Example 1: Direct mail coupon program

1. Packaged-goods company approaches charity directly and offers to distribute coupons, or a coupon book, featuring the manufacturer's brands and the charity. Manufacturer's program might include one or more of the following:
 - a) A simple statement that the manufacturer is "a proud sponsor" of the charity or is making its own donation to the charity.
 - b) Encouragement in the direct mailings for consumers to support the charity.
 - c) Inclusion of a membership form so consumers can become members of the charitable organization.
 - d) A flat fee to license use of the charity's name and logo in the campaign.
 - e) A promise to the charity and consumers that it will donate five cents to the charity for every coupon redeemed.
2. Is the manufacturer a "commercial co-venturer"?
 - a) Usually not for simple encouragement of consumer support for the charity, inclusion of a membership form, or merely advertising that it has made a donation.
 - b) But a promise to consumers that their purchases will benefit the charity would make the manufacturer a commercial co-venturer in states with applicable laws.
3. Is the manufacturer a "paid solicitor"?
 - a) Probably not – states that regulate commercial co-venturers generally would use those statutes, not the ones governing paid solicitors.
 - b) What about other states?

- i. By encouraging consumers to support the charity, or telling consumers that purchases will benefit the charity, the manufacturer may be "soliciting" "contributions."
 - ii. But is the manufacturer acting for "compensation"? Not in the ordinary sense. Nevertheless, some state officials have said unofficially that they may regard the additional goodwill and/or sales of products generated by such a promotion as "compensation," entitling the state to regulate marketers in this situation. Note that some state laws (*e.g.* Michigan, Tennessee, Washington and West Virginia) include parties who act for compensation "*or other consideration*," which gives regulators more latitude.
 - iii. Could be different if manufacturer said "donate to the charity by buying our product" - that seems more like a direct solicitation.
4. Is the manufacturer a "fundraising counsel"?

Unlikely in this situation. No advice, etc. to charity; all activity undertaken by manufacturer based on its own plan.
5. What is the Impact of the Multistate Guidelines?
 - a) Unclear. The Guidelines are intended primarily to help prevent misleading suggestions that the *charity* is endorsing the commercial party. Depending upon the facts, and the exact wording of the ads, the results could vary.
 - b) If the manufacturer merely says it is "a proud sponsor," or merely announces a gift *it* has made to the charity, there is relatively little risk. These statements probably are constitutionally protected free speech, and they don't suggest sponsorship *by the charity*.
 - c) Use of a charity logo for a fee may, in some circumstances, trigger Guidelines 2, 4, and 6 — *i.e.*, the manufacturer may need to disclose that the charity has not endorsed the product, that the sponsor paid to use the charity's name, or that the relationship is exclusive. The risk is greatest where the charity and the manufacturer are in related fields — for example, a pharmaceutical company and the AMA. In such a case, the unexplained presence of the charity's name or logo may suggest endorsement (think about the American Dental Association's seal of approval on Crest toothpaste). In contrast, an automobile manufacturer's reference to its own donations to a children's hospital is unlikely to suggest sponsorship or endorsement *by the hospital* of the manufacturer.
 - d) Accurate disclosure of the effect of each consumer's purchase on the amount going to a charity is already required under many states' commercial co-venture laws. The Guidelines may extend this requirement to additional states. In particular, many states have expressed concern about commercial co-venture offers where the total contribution is capped and the consumer has no way to know whether the cap has already been reached. For this reason, caps are disfavored. If they are used, the sponsor either should have an effective means to communicate when the cap is reached, or should limit the promotion in terms of time or number of specially marked units of product to keep assure that substantially all units of product offered as part of the promotion will count as part of the promotion.

B. Example 2: Co-op program involving a charity, a promotional agency, and manufacturers

1. Promotion agency approaches charity and offers to assemble a promotion package focused on the charity's annual telethon.
 - a) How the money flows: Charity will pay agency's costs. Agency earns nothing unless manufacturers sign up, in which case agency is paid and keeps 20% of all amounts received by the charity through the promotion. Manufacturers pay charity a flat fee to participate, plus extra amounts for any special recognition they select.
 - b) Manufacturers' participation: Agency offers manufacturers a package including use of charity's name and logo, opportunity to participate in a coupon event, a sweepstakes offered in-store and/or in an FSI, signage and credit during the telethon, and the opportunities for special recognition during the telethon (through special awards and events).
2. Who is regulated here? Any difference from Example 1?
 - a) Manufacturers. Depending on what they say in their ads, they could be treated as commercial co-venturers, just as in Example 1.
 - b) Agency as "Solicitor." The agency has played several roles which could subject it to different forms of regulation. For example, the agency has offered manufacturers and the coupon distributor a chance to participate in the program. The manufacturers and distributors pay money to the charity to participate. The agency is paid 20% of the amounts received by the charity. Is it therefore a "paid solicitor" (*i.e.*, someone who for compensation solicits contributions)?
 - i. Unlikely, but not entirely clear: The agency can argue it is promoting a commercial venture (marketing and licensing rights for money), not soliciting charitable "contributions." But the way the agency constructs its marketing effort could influence the result: emphasis on commercial benefit to participating brands (rather than **donative** intent of participating brand or contributory benefit to charity) would help. *See Attorney General v. International Marathons, Inc.*, 392 Mass. 370, 467 N.E. 2d. 51 (1984) (agency not a paid solicitor).
 - ii. Agency also probably is not a "paid solicitor" if it conceived this plan while working for and being paid by the manufacturer, rather than the charity.
 - c) Agency as Fundraising Counsel? The Agency initially offered the promotion idea and agreed to put it in place for compensation – is the agency a fundraising counsel?
 - i. Unclear. Normally, fundraising counsel is only someone who advises or consults with respect to the solicitation of charitable contributions *by the charitable organization*.
 - ii. In Example 2, the charity itself solicited only in the telethon. Therefore, agency shouldn't be deemed a fundraising counsel, except possibly to the extent it advised the charity with respect to how to conduct the telethon, rather than how to obtain sponsors for the telethon.
 - iii. Different result if charity went out itself to sign up manufacturers? If agency worked primarily for the charity? If the primary pitch to the manufacturers focused on donations rather than business opportunities?

- C. Example 3: Website telling the consumer that, every time he or she makes a purchase from a participating merchant through the website, a designated percentage of the purchase price (say 10%) will be credited to an account in the consumer's name. The consumer can then elect to receive that amount as a cash refund, or apply it to future purchases, or instruct the web site to donate it to any charity designated by the consumer.
1. Commercial Co-Venture? The basic offer to the public – "Buy a product and a charity will benefit – certainly sounds like a co-venture offer. But the web site is not paying its own money to the charities; it is inviting consumers to make direct donations to the charity.
 2. Professional Solicitor/Fundraising Counsel? This is not a traditional arrangement where a charity pays a fee to a solicitor. But the web site appears to be a commercial party that is asking people to make donations. It also holds the money "in trust" until the consumer directs a contribution to be made. The "compensation" to the website may not be obvious, but it might come from participating merchants paying a commission on each transaction. Ad revenues from site traffic may also be relevant. Either way, the web site operator is making money (or trying to) from an activity that focuses on encouraging (and facilitating) donations. Expect to see states starting to apply their "solicitor" or "fund-raising counsel" laws to some of these sites, especially where the website operator holds the money prior to making any donations.
- D. Example 4: Manufacturer advertises that all profits, after taxes, from sale of all its products will be donated to charity. No time limit on offer. No specification of charity.
1. Co-Venture? Maybe. But if company always gives *all* profits to charity, is it "regularly engaged in commerce other than raising funds for charities"?
 2. Professional Fund-Raiser? Maybe. At least if you subscribe to the theory that increased goodwill = compensation.
 3. Charity? Maybe. In some ways this is the most logical category. It's also the most heavily regulated. Watch for developments in this direction if states suspect that the company is not acting properly.
- E. Example 5: Manufacturer helps organize and advertise a "benefit" concert saying "all proceeds will benefit" a named charity. The event is held in a local arena. Tickets are purchased through the arena's box office.
1. Co-Venture? Maybe. But manufacturer more likely is just a volunteer, unless it actually handles the money in which case there is a greater risk of being deemed a co-venturer.
 2. Arena. Probably just a vendor supplying its services for normal compensation.
- F. Example 6: Retailer invites consumers to make donations to charity at checkout counter. What result? Is retailer compensated? If not, the risks probably are low.

But, handling charitable donations from consumers is an invitation to regulators to pay attention. For example, Illinois could apply its "charitable trust" law (anyone who holds money for the benefit of a charity) as it does to traditional co-venturers. Similarly, Massachusetts authorities have been reported to have taken the position that a non-compensated retailer may be deemed a co-venturer (and therefore subject to registration and bonding) if the retailer has custody of consumer contributions before turning them over to the charity. Additional states could apply "professional solicitor" laws if they were to take an expansive view of increased "goodwill" as constituting a form of compensation to the retailer.

- G. Example 7: Sponsor invites consumers to take some totally free action, such as "voting" on a website, with a promise to make a donation for each consumer visit/action. Do the CCV laws apply? Read expansively, at least some laws could theoretically apply because a representation is made that the "use" of a "service" offered by the sponsor will benefit a charity. As a matter of enforcement policy, however, many states likely don't place priority on situations where the consumer pays no money at all – either for a purchase or a donation. Also, if the consumer action is simply to "vote" where the sponsor should allocate a pre-determined aggregate donation, there is an additional defense that the consumer action does not *generate* the donation but instead simply helps advise the sponsor where to allocate a pre-determined donation.

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