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Corporate Counsel

Nonprofit Organizations Committee Legal Quick Hit: Commercial Co-ventures – Best Practices and Legal Developments for Nonprofits

MODERATOR: JEFFREY S. TENENBAUM, ESQ.

TUESDAY, FEBRUARY 12, 2013

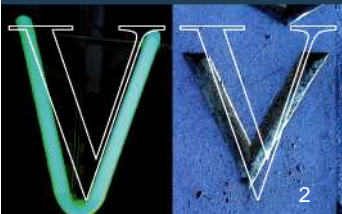
PRESENTERS: KRISTALYN J. LOSON, ESQ.

3:00 p.m. EST



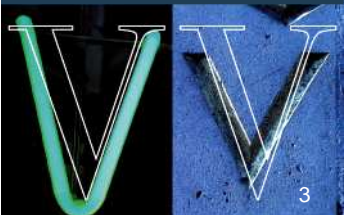
Agenda

- Recognizing Commercial Co-ventures
- Common Regulatory Requirements
- Contractual Issues
- Disclosures
- The Charity's Role – Federal Tax Considerations
- Emerging Models and New Considerations



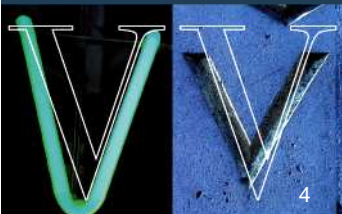
State Regulation of Charitable Solicitation

- Charity / Nonprofit Organization
- Professional Solicitor
 - Professional Fundraiser
 - Professional Fundraising Counsel / Consultant
- Commercial Co-Venturer



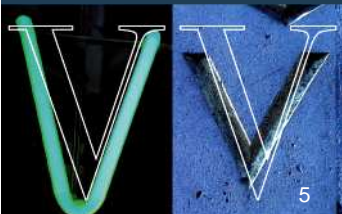
Current State Regulation – Commercial Co-Venture

- **Commercial Co-Venture (“CCV”)** – A person who regularly and primarily is engaged in a trade or business other than the raising of funds for charities that conducts a charitable sales promotion.
 - **Charitable Sales Promotion** – offering goods or services on the representation that the purchase or use of goods or services will benefit a charitable organization or a charitable purpose.
- Frequently referred to as “cause-related marketing”.



Definitions Can Vary by State

- **NY** definition of “commercial co-venturer” is fairly standard:
 - “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 of goods, services, entertainment, or any other thing of value will benefit a charitable organization.” [N.Y. Exec. Laws § 171-a]
- Compare with broader **MA** statute:
 - “[A]ny person who for profit or other commercial consideration conducts, produces, promotes, underwrites, arranges or sponsors a performance, event, or sale to the public of any good or service which is advertised in conjunction with the name of any charitable organization or as benefitting to any extent any charitable purpose.” [Mass. Gen. Laws ch. 68, § 18, 22-28]



CCVs – Examples

New Balance Lace Up for the Cure

FREE SHIPPING WITH ANY LACE UP FOR THE CURE ORDER

Lace Up Collection

SHOES

- [View All Shoes](#)
- [Casual/Dress](#)
- [Cross-Training](#)
- [Running](#)
- [Sandals & Slides](#)
- [Toning](#)
- [Walking](#)

APPAREL

- [View All Apparel](#)
- [Casual Tops](#)
- [Performance Tops](#)
- [Jackets](#)
- [Shorts & Skirts](#)

ACCESSORIES

- [View All Accessories](#)
- [Bags](#)
- [Hats & Gloves](#)
- [Laces](#)
- [Socks](#)
- [Sports Bras](#)
- [Sports Monitors](#)
- [Sunglasses](#)

LACE UP FOR THE CURE COLLECTION

Honor loved ones who have been affected by breast cancer. Celebrate survivors. Show your support for the cause.

As part of our efforts to promote good health for everyone, New Balance will contribute 5% of the suggested retail price of sales from the Lace Up for the Cure® Collection with a guaranteed minimum donation of \$500,000 to Susan G. Komen for the Cure®.

Lace Up Shoes

Your favorite New Balance running, walking and toning shoes in pink Lace Up designs.

[View All Lace Up Shoes](#)

Lace Up Apparel

The performance apparel you expect from New Balance featuring empowering messages.

[View All Lace Up Apparel](#)

Lace Up Accessories

Show your support from head to toe in hats, socks, bags and more that sport the Lace Up logo.

[View All Lace Up Accessories](#)

Personalize the Fight

Celebrate a survivor in your life with a personalized pair of 993 running shoes.

[Create a pair now](#)

The 860 Walking Shoe

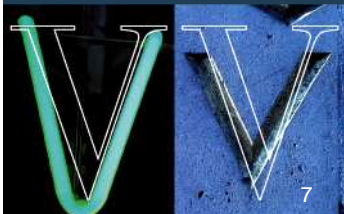
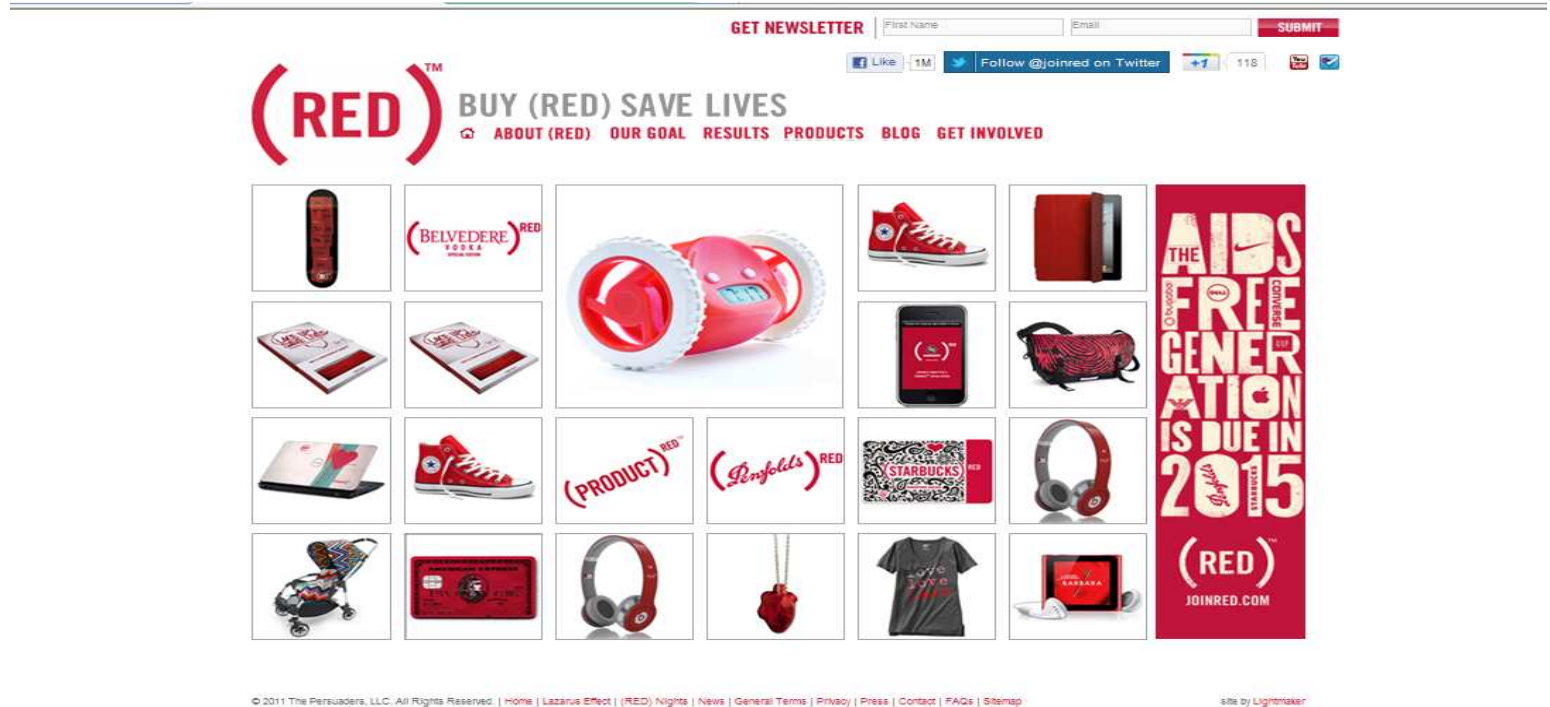
Official shoe of the Susan G. Komen 3-Day for the Cure™.

[Shop the 860 Walking Shoe](#)
Also available in Running

What's Popular In our Lace Up for the Cure Collection

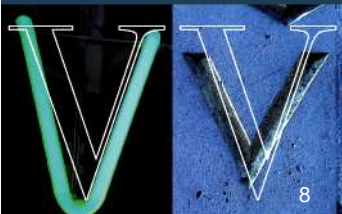


CCVs – Examples (RED) Campaign



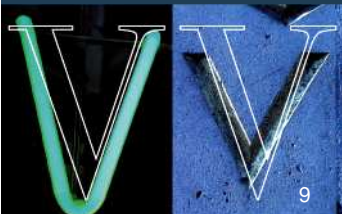
Current State Regulation

- About 25 states Define and Regulate Commercial Co-Ventures
 - **Registration** (4-5 States)
 - Bonding
 - **Written Contract** (Filed By CCV or Charity)
 - **Advertising Disclosures**
 - **Accounting and Recordkeeping**



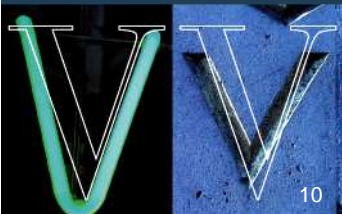
Contracts with Commercial Co-Venturers

- Some states require filing of contracts (by CCV or charity).
- Almost all other states have right to inspect contract, even if no obligation to file.
 - Contract should be retained by charity and commercial co-venturer for at least three years.



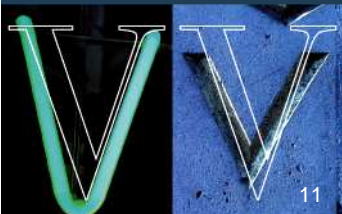
Contracts with Commercial Co-Venturers

- Term of Agreement and Dates of Solicitation (Dates of Campaign)
- Amount to Be Donated (\$ or % of Items)
- Geographic Scope of Campaign
- Schedule for Donations to Be Transferred
- Schedule for Reporting
- Charity's Ability to Cancel
- Branding and Intellectual Property Terms
- Reps and Warrants Re: Compliance with Laws
- Advance Approvals
- Clear Tax Treatment and Description of Activities



Contracts with Commercial Co-Venturers

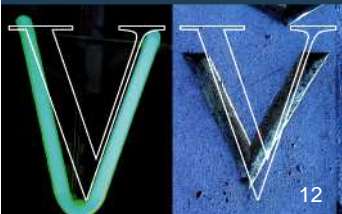
- Consider Who Must Sign Contract
- Multiple Parties
- Key Timing Issues



Advertising Disclosures

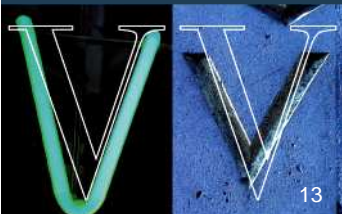
- Common Statutory Requirements
- Period of Campaign
- Amount to Be Donated (% or \$)
- Charity Name and Address
- Charitable Purpose
- Minimum or Maximum Donation

- Other Considerations
- Which Entity?
- Where Must Be Disclosed?
- Better Business Bureau Standard 19



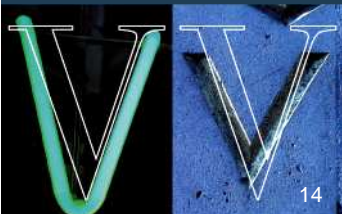
Regulators Recommendations – NY AG Best Practices for Transparent Cause Marketing

- Whether Additional Consumer Action Is Required
- Given on all “advertisements, websites, and product packaging” and in “clear and prominent format and size” in “close proximity to” text of advertisement
- Suggestion of “Donation Label”
- Attention to Social Media



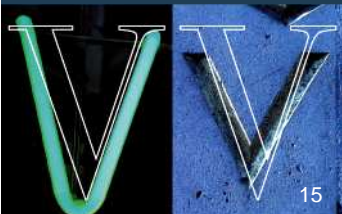
The Charity's Role – Federal Tax Considerations

- Will the charity be required to promote?
- Unrelated Business Income – income from (i) a trade or business that is (ii) regularly carried on and (iii) is not substantially related to the organization's exempt purpose
- One campaign of short duration – likely okay, but consider aggregate activities



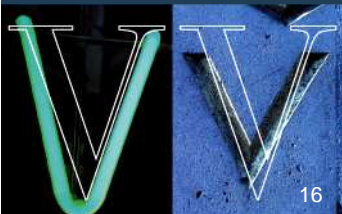
Emerging Issues

- Permanent Commercial Co-Ventures
 - Auction / Deal Sites
 - One for One Campaigns
- Social Media Promotions



Take-Aways for Nonprofits

- Recognize a Commercial Co-Venturer
- Plan for Fulfillment of Regulatory Requirements
- Have a Contract
- Review all Disclosures
- Consider Effect of Charity's Activities and Charity's Brand



Closing Thoughts

- Successful commercial co-ventures can be a win-win for all involved.
- But high visibility of campaign can lead to PR damage, attorney general enforcement matters, or even class action.



Contact Information

Jeffrey S. Tenenbaum, Esq., Partner
Chair, Nonprofit Practice Group

jstenenbaum@Venable.com

t 202.344.8138

Kristalyn J. Loson, Esq., Associate

kloson@Venable.com

t 202.344.4522

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