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October 2012

### Significant New and Higher Standards for Cause Marketing: New York Attorney General Releases Report on "Pink Ribbon" Campaigns

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The New York Attorney General ("NY AG") released a much-anticipated report on "pink ribbon" campaigns, last week. The report, entitled *Five Best Practices for Transparent Cause Marketing* (the "Best Practices"), available [here](#), originated from last year's NY AG initiative focused on breast cancer charities (widely covered by Venable; see links below). Although the NY AG initiative was specific to breast cancer charities, the Best Practices are broadly applicable to all cause-marketing efforts and will likely set a new bar by which the activities of companies and charities involved in these types of campaigns will be measured.

#### Background of Initiative

In October 2011, the NY AG celebrated National Breast Cancer Awareness Month by sending comprehensive questionnaires to at least 40 charities and over 130 companies asking for detailed information on promotions during which the sale of a product or service is advertised to benefit a charitable cause, in this case, breast cancer awareness. These types of promotional efforts that create goodwill for the company and generate income for a charity are commonly known as "cause-marketing" efforts and are classified as "commercial co-ventures" under New York law.<sup>1</sup>

As cause-marketing efforts have grown in popularity, some have to come to question whether consumers are made aware of the relevant information in such promotions and whether the charities are actually receiving the benefits that consumers believe are promised. The NY AG likely had these critiques in mind when it sent out its questionnaire. The questionnaire, which consisted of 19 questions, some with subparts, dove into questions of compliance with the New York Charitable Solicitation Act, such as asking whether the company had a written contract with the charity in place and whether an accounting had been provided to the charity. The questionnaire also comprehensively inquired into the way in which the campaign was advertised to consumers, requesting copies of each "product label, advertisement, announcement, message or other marketing material."

#### Release of Best Practices

After a year of analyzing responses to the questionnaire on "pink ribbon" and other similar campaigns, on October 18, 2012, the NY AG held a press conference and released the Best Practices. The Best Practices appear to be intended as far-reaching reforms to the way in which some cause-marketing promotions are currently conducted.

The Best Practices go beyond the general "avoid deceptive fundraising practices" standard and offer recommended practices for specific types and forms of cause marketing – from social media free-action programs to one-to-one in-kind donation programs – used by many charitable organizations. This report is by far one of the most significant, if not the most significant, proactive forms of guidance any state Attorney General has ever issued in the area of cause marketing. An overview of the themes found in the specific recommendations of the Best Practices is below.

#### Expanded Disclosure Requirements

While many states' current regulations for cause marketing require that certain disclosures be given "on all advertising," the NY AG's Best Practices fill in the details and leave little to the discretion of the reasonable person. The list of items for disclosure is noticeably longer than any other state regulations currently require. Specifically, the Best Practices call for the following to be disclosed:

- the specific dollar amount per purchase that will go to the charity;
- the name of the charity;

- the charitable mission if not readily apparent from the name of the charity;
- whether consumer action is required for the charitable donation to be made; and
- the start and end dates of the campaigns.

By comparison, currently most other state statutes expressly require disclosure of (i) the name of the charity, (ii) the amount or percentage per unit that will be donated to the charity, and, sometimes (iii) the dates of the campaign.

Additionally, the Best Practices state that the expanded disclosures should be given on “advertisements, websites, and product packaging;” should be in “clear and prominent format and size;” and should be located “in close proximity” to the text of the advertisement. Depending upon the nature and structure of the campaign, adhering to this guidance may be challenging without additional examples from the NY AG.

#### *Suggestion of “Donation Information” Label*

The Best Practices take disclosures a step further in suggesting that each product in the promotion and website used to advertise the promotion showcase a “Donor Information” label which would be similar to a nutrition label on food items and would identify for donors key information about the campaign in a standardized format. While an innovative suggestion, it remains to be seen how proposed information labels and disclosures would be implemented in various advertising formats where space is often at a premium.

#### *Attention to Social Media Campaigns*

The Best Practices also push the bounds of current regulation by extending disclosure requirements to certain social media campaigns. While social media advertisements which encourage the purchase of a product or service with the promise of a donation to charity are covered under traditional regulation of cause marketing, free-action programs – such as liking a Facebook page or submitting contact information on a company website to trigger a donation – are not normally covered by the regulatory definition of a “commercial co-venturer.” This is because such promotions do not involve the element of a purchase or use of the company’s product or service as a prerequisite to the company’s donation. As the specific disclosure requirements for commercial co-venturers do not apply to such campaigns, they are usually subject to the more general standard of avoiding “unfair and deceptive” advertising.

The Best Practices state, however, that “companies and charities should be no less vigilant about transparency in social media cause-marketing campaigns than they are in traditional product-based campaigns.” This is one of the first times that a regulator has recognized free-action programs in social media to be under the umbrella of cause marketing. The Best Practices go on to recommend that social media cause-marketing programs disclose, at a minimum:

- the amount donated per action;
- the name of the charity that is benefitting;
- the dates of the campaign; and
- the minimum and maximum to be donated.

The Best Practices also recommend implementing a real-time tracking system to cut off the social media campaign when the maximum donation amount is reached or otherwise alert consumers that their action will no longer result in a donation, something that also has not been seen as a requirement in regulatory guidance. For companies and charities used to conducting social media campaigns on a more informal basis, complying with the suggested disclosures will take some careful planning.

#### **Enforcement**

In issuing its Best Practices, the NY AG took a unique approach to ensuring that the guidelines are followed, at least in pink ribbon promotions. At the time of the press release, the NY AG announced that the nation’s two largest breast cancer charities – Susan G. Komen for the Cure and the Breast Cancer Research Foundation – had both signed off on, and voluntarily agreed to follow, the NY AG Best Practices in all of their cause-marketing endeavors. This effectively means that a large number of companies that want to hold a pink ribbon promotion also will be playing by these new rules.

And while they have not been directly adopted into law, the guidelines contained in the Best Practices could be used by the NY AG and other state regulators to inform such regulators’ enforcement of general prohibitions against unfair and deceptive marketing as found in state mini-FTC Acts. If used as benchmarks for advertising standards, the Best Practices could have far-reaching effects on the ways in which charities and companies conduct cause-marketing campaigns.

#### **Conclusion**

Overall, the Best Practices reinforce the general legal principles that have always applied to companies and charities conducting cause-marketing campaigns, but provide additional specific and concrete examples of disclosures to consider. A decision to disregard these standards could lead to a greater risk of investigation and enforcement. For companies considering cause-marketing campaigns, the new breadth of recommended disclosures in the Best Practices may take some planning and creative coordination to ensure compliant campaigns. Ultimately, it is possible and perhaps even likely that the Best Practices will provide a new norm as cause-marketing campaigns continue to generate goodwill for companies and increase revenue for charitable causes.

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Venable's prior articles on the NY AG "Pink Ribbon" initiative can be found at:

- **"Charitable Solicitation and Commercial Co-Venturer Red Flags: Insights for Charities and Marketers from the NY Attorney General"**
- **"Nineteen Questions Every Cause-Related Marketer Should be Prepared to Answer"**
- **"Cause-Related Marketing in the Crosshairs: What the New York Attorney General's Breast Cancer Investigation Means for Nonprofits and Their Corporate Supporters"**

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*This article is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to a specific fact situation.*

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<sup>1</sup> New York Executive Law 7-A, Section 171-a(6) defines a "commercial co-venturer" 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.