

## Articles

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### Avoiding Legal Pitfalls in Cause-Related Marketing

Related Topic Area(s): Antitrust and Trade Regulation, Tax and Employee Benefits

Marketers are increasingly looking to affiliate with charities in cause-related marketing efforts, such as arrangements in which a charitable donation is built into the cost of purchase of a good or service, to both raise donations and corporate image. After two years of decline, charitable giving as a whole is increasing, according to a recent survey conducted by the *Chronicle of Philanthropy*, and marketers may be even more interested in cause-related marketing campaigns.<sup>1</sup> However, as seen by the recent class-action lawsuit filed against Lady Gaga over charity wristbands for Japanese earthquake victims,<sup>2</sup> good intentions are not enough to prevent scrutiny and legal trouble.

The suit filed against Lady Gaga (whose real name is Stefani Germanotta) alleges that in selling \$5 wristbands that say “We Pray for Japan,” Lady Gaga violated federal racketeering and consumer protection laws and engaged in unfair and deceptive advertising by stating that “all proceeds go the Japan Tsunami Relief.” According to the complaint, a class action filed by an attorney with 1-800-LAW-FIRM (a Michigan-based legal network) on behalf of consumers, this statement was misleading in that it did not account for taxes and shipping fees on its wristbands.<sup>3</sup>

While the legal merits of the claims are yet to be evaluated, this case serves as a reminder for any marketer seeking to enter a cause-related marketing relationship with a charity to pay attention to potential legal issues prior to embarking on a marketing or advertising campaign. Below we highlight a few of the key issues to be considered. We note that this article does not address federal tax requirements and considerations under the Internal Revenue Code, such as the charitable tax deductibility of donations, required charitable contribution notices and disclosures, and the taxability of income earned by the charity, among others. These are very important issues for charities, but are beyond the scope of this article.

#### Commercial Co-Venturer Registration

Currently, over 20 states regulate “commercial co-ventures,” typically defined under state law as “arrangements between a commercial entity under which the commercial entity advertises in a sales or marketing campaign that the purchase or use of its goods or services will benefit a charity or a charitable purpose.” While commercial co-venturer relationships come in many shapes and forms, the most common scenario involves a for-profit, taxable business using the name and logo of a charitable organization for the purpose of increasing sales of the for-profit entity’s products or services while at the same time increasing revenue to the charity.<sup>4</sup> As their popularity has increased, such arrangements have come under increased regulation and scrutiny.

In some states, the commercial entity – often referred to as the “co-venturer” – is required to register with the state prior to the marketing of the commercial co-venturer relationship and must meet requirements such as posting a bond and filing financial reports with the state. In other states in which registration may or may not be required, specific recordkeeping requirements and/or mandatory contractual terms between the organization and the commercial co-venturer may be imposed. State statutes also may specify required disclosures for advertising the good or service and typically prohibit the commercial entity from making false or misleading statements in connection with a solicitation.

States have been particularly active in enforcing commercial co-venturer statutes and charitable solicitation laws in general. The Attorney General of each state generally holds enforcement power under these statutes and fines for violations can be extremely significant. Some of these statutes also contain private rights of action, including, in some cases, allowing plaintiff’s lawyers to bring class-action lawsuits on behalf of a large class of consumers, greatly increasing the risk and stakes for the marketers and charities who become targets of those suits. Therefore, it is important that marketers embarking on campaigns with charities consider state regulation of commercial co-ventures and plan

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for meeting registration, disclosures, filings, and other applicable requirements before launching their campaigns.

### **Unfair and Deceptive Practices**

In addition to potential state registration requirements, both the Federal Trade Commission Act (the “FTC Act”) and state consumer protection statutes (often referred to as “mini-FTC Acts”) prohibit unfair and deceptive trade practices, which include misrepresentations of material facts regarding an advertised product or service as well as omissions of information that would be material to a consumer’s decision to purchase a product or service.

The FTC and state Attorneys General have collaborated on a number of actions to enforce the FTC Act and mini-FTC Acts against charities and fundraisers alleged to engage in deceptive marketing practices, including in cause-related marketing efforts. For example, the FTC has brought actions against companies alleged to have deceptively offered advertising space under the guise that it would benefit a law enforcement organization,<sup>5</sup> sellers of household goods alleged to have been manufactured by disadvantaged workers,<sup>6</sup> and a company selling children’s activity books claiming to benefit children’s hospitals.<sup>7</sup>

In one well-known example, the Georgia Attorney General investigated a Yoplait yogurt campaign designed to benefit the Breast Cancer Research Foundation where the company advertised that it would make a contribution for each lid collected without revealing the agreed-to maximum total donation of \$100,000.<sup>8</sup> This investigation concluded with General Mills, the company behind the Yoplait campaign, paying an additional \$63,000 to the Breast Cancer Research Foundation, representing the amount that would have been donated through the lid collection efforts of Georgia consumers. Although it does not appear one was initiated in this case, Georgia, like several other states, includes a private right of action for persons injured as a result of a violation of its charitable solicitation statute, and also expressly permits class-action lawsuits, adding another level of risk for a cause-related marketing campaign.

As Lady Gaga discovered, claims of certain percentages going to charity often are closely scrutinized. Therefore, marketers entering into ventures with charities should take care to look at their claims from every angle to ensure that, in seeking to increase donations to a charitable cause, consumers are not misled. Marketers also should review and make appropriate disclosures concerning applicable timeframes for campaigns and any contribution caps.

### **Relationships with Charitable Organizations**

Marketers should perform due diligence on potential partners when entering into any new commercial venture, and cause-related marketing efforts should be no different. In fact, because charities are themselves subject to legal and regulatory requirements, the marketer is opening itself to some unique legal and relationship risks in cause-related marketing campaigns. For example, one risk may be that the charitable organization is not itself in compliance with applicable charitable solicitation requirements<sup>9</sup> or is found to be a “scam” organization (somewhat rare but not at all unheard of).

For these reasons, marketers should consider adopting contractual protections in their cause-related marketing agreements. These protections could address such areas as compliance with charitable solicitations laws and the Internal Revenue Code. The marketer also should develop a due diligence and reporting program in order to collect relevant information to confirm the charity’s compliance with applicable federal and state law. Finally, provisions for indemnification of the marketer by the charity for any claim related to the legal or regulatory status of the charitable organization, as well as insurance to cover the indemnity obligation, also should be considered in the agreement with the charity.

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The rise in popularity of cause-related marketing allows consumers another way to contribute to worthy causes and raise corporate goodwill. While there are certainly some risks involved for marketers, with appropriate attention, these risks are manageable and marketers can take proper precautions to steer clear of legal pitfalls.

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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> Holly Hall and Heather Joslyn, *Giving's Recovery Lacks Momentum Says Charities*, CHRONICLE OF PHILANTHROPY, June 26, 2011, available at <http://philanthropy.com/article/Outlook-for-Giving-in-2011-Is/128011/>.

<sup>2</sup> See *Lady Gaga Sued Over Japan Earthquake Charity Bracelets*, REUTERS, June 27, 2011, available at <http://www.reuters.com/article/2011/06/27/us-ladygaga-idUSTRE75Q57220110627>.

<sup>3</sup> See complaint in *Caitlin Demetsenare v. Stefani Germanotta et. al*, No. 2:11-CV-12753-BAF-LJM (E.D.M.I. 2011).

<sup>4</sup> See *What's in a Nonprofit's Name: Public Trust, Profit and the Potential for Public Deception; A Preliminary Multistate Report on Corporate-Commercial/Nonprofit Product Marketing and Advertising of Commercial Products* (1999), available at [http://www.oag.state.ny.us/press/reports/nonprofit/full\\_text.html](http://www.oag.state.ny.us/press/reports/nonprofit/full_text.html).

<sup>5</sup> See *FTC v. Southwest Marketing Concepts, Inc.*, Civ. No. H-97-1070 (N.D. Tex. 1997).

<sup>6</sup> See *FTC. v. Crooked Oak Investments et al.*, Civ. No. 00-1496 PHX-ROS (D. Ariz. 2000).

<sup>7</sup> See *FTC v. DPS Activity Publishing, Ltd. et al.*, Civ. No. C 03-1078C (W.D. Wash. 2003).

<sup>8</sup> See GA Secretary of State press release, available at <http://sos.georgia.gov/pressrel/pr991221.htm>.

<sup>9</sup> In the vast majority of states, the charitable organization is required to register prior to conducting solicitations or having solicitations conducted on its behalf.