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

MODERATOR: JEFFREY S. TENENBAUM, ESQ.
PRESENTERS: KRISTALYN J. LOSON, ESQ.
TUESDAY, FEBRUARY 12, 2013
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
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

To view Venable’s index of articles, PowerPoint presentations, recordings and upcoming seminars on nonprofit legal topics, see