



Webinars for Wise Nonprofits

Connecting Corporate Dollars to Your Cause: Cause-related Marketing

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Connecting Lawyers, Nonprofits, and Communities



Disclaimer

Please note: Today's presentation is informational only and is not intended to constitute legal advice. This presentation references both federal and state laws and regulations but primarily focuses on New York law. Please consult with appropriate counsel for guidance pertinent to your organization or situation.



Agenda

- What is Cause-related Marketing?
- Legal Considerations and Best Practices:
 - New York state requirements
 - Multi-state compliance
 - Adjacent nonprofit legal considerations
- CRM Contracts



What is Cause-related Marketing for Nonprofits?



What is Cause-related Marketing?

- Cause-related marketing (“CRM”) is a collaboration between a nonprofit and a for-profit in which the for-profit conducts a sales promotion or underwrites, arranges, or sponsors a sale, performance, or event that is advertised to benefit a charitable organization.
- Sometimes called “charitable sales promotion” or “commercial co-venture”



Examples of Cause-related Marketing

- **Point-of-sale**
 - When a consumer is asked for a donation at the point of sale or advertisements encouraging donations are displayed at the register. (e.g., FAO Schwartz/Ali Forney Center)
- **Purchase or action triggered donation**
 - When a consumer buys a product and a percentage of the sale is made as a donation to a cause
- **Affinity relationships**
 - When a for-profit company wants to affiliate itself with a nonprofit company (often by paying for a license to use a nonprofit's branding on its products). (e.g., (RED)[™])
- **Message Promotion**
 - When a nonprofit partners with a for-profit company to help promote its mission or message
- **Employee Engagement**
 - When a company uses employee volunteers for social good. (e.g., Home Depot/Habitat for Humanity)
- **Digital Programs**
 - When a company uses the web and social media based services to promote and collect donations. (e.g., Amazon Smile)
- **Certification programs**
 - When nonprofits provide a kind of “certification” of a for-profit company's product (e.g. American Heart Association's “Heart Check”)



Case Study: Stumptown Coffee Roasters

- **Purchase or action triggered donation**
 - Every purchase of the Vivid Bloom beans triggers a 1% donation to local bee & pollination organizations
- **Employee engagement**
 - Through the Stumptown Bee Stewardship Program, employees volunteer with local beekeepers in Oregon, California and New York to learn about and care for the local hives in hopes of healing urban landscapes and maintaining the health of the bee populations
- **Certification program**
 - Enveritas is a nonprofit that assesses and verifies the sustainability of coffee supply chains
 - Coffee companies receive a responsible sourcing claim from Enveritas if they fulfill certain steps
 - Stumptown's sustainability and impact report cites the company's partnership with Enveritas



Should your nonprofit engage in CRM?

POTENTIAL BENEFITS

- Opportunity to increase funding
 - Donations, other funders
- Opportunity to promote programs
 - Exposure on social media
 - Exposure through products
- Networking opportunities
 - new partners
 - collaborations
 - volunteers

POTENTIAL RISKS/BURDENS

- Allocation of staff resources
- Administrative burden
- Regulatory compliance
- Legal considerations
- Reputational risk
- Conflicts of interest



What is a Commercial Co-venturer?

- Under New York law, a commercial co-venturer (“CCV”) is 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 ((N.Y. Exec. Law § 171-A)
- For more information, see the Lawyers Alliance legal alert on cause-marketing agreements¹

¹https://lawyersalliance.org/userFiles/uploads/legal_alerts/Cause_Marketing_Commercial_Co-Ventures_Legal_Alert.pdf



Legal Considerations and Best Practices



Overview of CRM Requirements – Depends on State

Prior to the CRM

During the CRM

After the CRM

Adjacent nonprofit legal considerations

- Consumer protection
- Endorsements
- Private benefit or inurement
- Unrelated Business Income



New York Registration Requirements

- In New York, any nonprofit that *solicits* contributions from persons in New York or from any government agency must be registered with the Attorney General (N.Y. Exec. Law § 172)
- In most states, all nonprofits are required to register, so be sure to check the relevant state requirements regarding charitable solicitations
 - While New York only requires nonprofits and not CCVs to register, remember to check state registration rules for both nonprofits and for CCVs in other states



State Registration Requirements

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**states have laws that
regulate various types
of fundraising**

~20

**states have laws that
specifically regulate
CCVs**

Each state has its own definition of the amount of fundraising that triggers an obligation to register.

For more information, see: <https://www.nasconet.org/wp-content/uploads/2020/05/NASCO-State-Charities-Registration-Survey-5.15.20-.pdf>



Multi-State Compliance

- Nonprofits and CCVs should think carefully about the potential geographic scope and reach of their campaign
- Making a CRM campaign available to consumers in a particular state may require the nonprofit to register to solicit charitable contributions in that state – be sure to check each state’s particular laws or exclude that state from the promotion

Rule of thumb for “*minimum contact*”

- a. when the non-internet activities of the nonprofit alone is sufficient to require registration or
- b. the nonprofit and/or the CCV specifically targets people physically located in the state or that the nonprofit receives contributions from that state on an *ongoing or substantial basis*

Source: Charleston Principles (nasconet.org)



Hypo: Comfy Empire

- Comfy Empire is a boutique furniture company. Customers can shop at their brick and mortar stores in Maine, Massachusetts, New York and South Carolina or order any furniture piece online as Comfy Empire ships nationwide, including to Hawaii and Alaska
- Comfy Empire recently released a line of furniture inspired by Mayan designs. As a promotion, Comfy Empire has announced that 1% of the proceeds from this line of furniture will be donated to their nonprofit partner, a New York 501(c)(3) that works to mentor and fund female entrepreneurs from Central America



New York Contracting Requirements

- New York state law requires there to be a written contract for the cause-related marketing arrangement
- In contracts between a nonprofit and a CCV, New York imposes an explicit cancellation right in favor of the nonprofit within the first 15 days after the contract is filed with the attorney general, regardless of when the contract is executed.

Tip: Make sure your contract clearly spells out your right to cancel, the cancellation period, and the addresses of the CCV and the Attorney General to whom notices must be sent





New York CRM Consumer Disclosures

- New York law requires that advertising of any kind that states that it will benefit a nonprofit must disclose:
 1. the anticipated portion of the sales price;
 2. percentage of the gross proceeds; and
 3. dollar amount per purchase, or other consideration or benefit the nonprofit is to receive.

Tip: Make sure your CRM contract is clear about how your intellectual property will be used in any solicitations/disclosures



Five Best Practices from NY AG

1. Clearly describe the promotion
2. Allow consumers to easily determine donation amount
3. Be transparent about what is not apparent
4. Ensure transparency on social media
5. Tell the public how much was raised

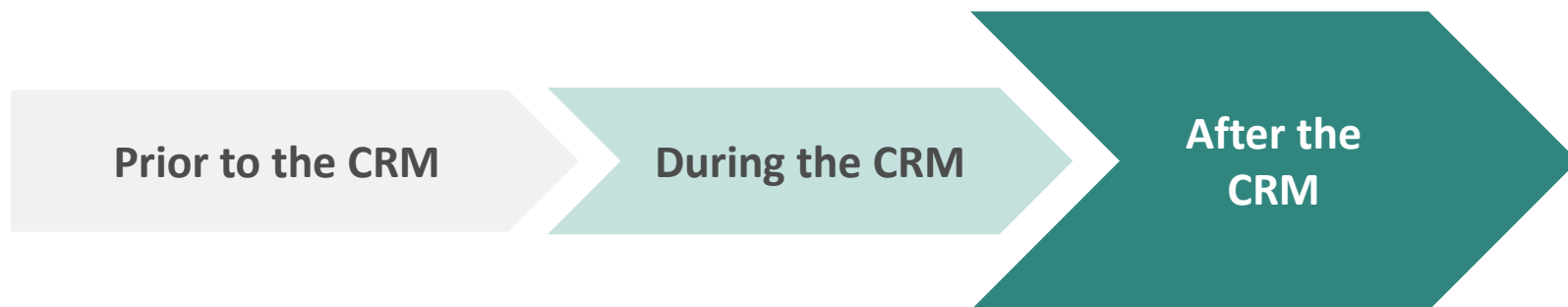
Source: <https://on.ny.gov/3NGu9nw>



Additional Disclosure Best Practices

- According to Better Business Bureau Standard 19, to clearly disclose how a charity benefits from the CRM, the promotion should disclose, at the point of solicitation:
 - the actual or anticipated portion of the purchase price that will benefit the charity (e.g., 5 cents will be contributed to ABC charity for every XYZ company product sold)
 - the duration of the campaign (e.g., the month of October)
 - any maximum or guaranteed minimum contribution amount (e.g., up to a maximum of \$200,000)

Source: <https://give.org/charity-landing-page/bbb-standards-for-charity-accountability>



New York Reporting Requirements

- New York State Attorney General's office: complete the CHAR500 disclosure on whether a non-profit worked with a CCV and Schedule 4a for Professional Fund Raisers, Fund Raising Counsels, CCVs

4. Schedules and Attachments	
See the following page for a checklist of schedules and attachments to complete your filing.	<input type="checkbox"/> Yes <input type="checkbox"/> No 4a. Did your organization use a professional fund raiser, fund raising counsel or commercial co-venturer for fund raising activity in NY State? If yes, complete Schedule 4a. <input type="checkbox"/> Yes <input type="checkbox"/> No 4b. Did the organization receive government grants? If yes, complete Schedule 4b.

- In New York State, once a nonprofit has entered into a contract with a CCV, the nonprofit must file with the Attorney General on the date that the next financial report is due to be filed:
 - a list of the names and addresses of all CCVs authorized by the nonprofit to use its name during the year covered by that financial report and, if known, the year after
 - a statement of the financial terms and any conditions of each commercial co-venture contract, and
 - a statement as to whether each CCV has provided the charitable organization with the accounting required by the law

CHAR500		2019 Open to Public Inspection
Schedule 4a: Professional Fund Raisers, Fund Raising Counsels, Commercial Co-Venturers www.CharitiesNY.org		
If you checked the box in question 4a in Part 4 on the CHAR500 Annual Filing for Charitable Organizations, complete this schedule for EACNY Professional Fund Raisers (PFR), Fund Raising Counsel (FRC) or Commercial Co-Venturer (CCV) that the organization engaged for fund raising activity in NY State. The PFR or FRC should provide its NY Registration Number to you. Include this schedule with your certified CHAR500 NY State Annual Filing for Charitable Organizations and use additional pages if necessary.		
Definitions A Professional Fund Raiser (PFR), in addition to other activities, conducts solicitation of contributions and/or handles the donations (Article 76, 171-a-b). A Fund Raising Counsel (FRC) does not solicit or handle contributions but limits activities to advising or assisting a charitable organization to perform such functions for itself (Article 76, 171-a-b). A Commercial Co-Venturer (CCV) is an individual or the profit company that is regularly and primarily engaged in trade or commerce other than raising funds 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 (Article 76, 171-a-b). Professional fund raising does not include activities by an organization's development staff, volunteers, or a grantwriter who has been hired solely to draft applications for funding from a government agency or tax exempt organization.		
1. Organization Information		
Name of Organization:		NY Registration Number:
2. Professional Fund Raiser, Fund Raising Counsel, Commercial Co-Venturer Information Fund Raising Professional type: <input type="checkbox"/> Professional Fund Raiser <input type="checkbox"/> Fund Raising Counsel <input type="checkbox"/> Commercial Co-Venturer Name of FRC: <input type="text"/> Mailing Address: <input type="text"/> City / State / Zip: <input type="text"/> Telephone: <input type="text"/> NY Registration Number: <input type="text"/>		
3. Contract Information		
Contract Start Date: <input type="text"/>	Contract End Date: <input type="text"/>	
4. Description of Services		
Services provided by FRC: <input type="text"/>		
5. Description of Compensation		
Compensation arrangement with FRC: <input type="text"/>		Amount Paid to FRC: <input type="text"/>
6. Commercial Co-Venturer (CCV) Report		
<input type="checkbox"/> Yes <input type="checkbox"/> No If services were provided by a CCV, did the CCV provide the charitable organization with the interim or closing reports required by Section 1734a part 3 of the Executive Law Article 76A?		
CHAR500 Schedule 4a: Professional Fund Raisers, Fund Raising Counsels, Commercial Co-Venturers (Updated January 2020) Page 1		



New York Books and Records Requirements

New York state law requires that:

CCVs

- Provide an accounting of:
 - number of items sold
 - total dollar amount of the sales, and
 - amount or percentage paid or to be paid to the nonprofit within 90 days after the termination of CRM campaign or if ongoing for more than a year, at least annually
- Maintain accurate and current books and records in their offices of all activities for at least 3 years after the expiration of the contract, and to make such books and records available for inspection and auditing by the non-profit and the AG

Both nonprofit and CCV

Maintain on file true and correct copies of the CRM contract during and for 3 years after termination of the arrangement



Summary of CRM Requirements – Depends on State

Prior to the CRM

- CCV may have to register, provide notice and/or post bond with the state charities regulator
- Nonprofit & CCV may have to include certain provisions in a written contract

During the CRM

- Promotions may have to disclose certain information

After the CRM

- CCV may have to provide an accounting to the nonprofit or pay the nonprofit within a specified time
- CCV and/or nonprofit may have to report to the state charities regulator
- There may be document retention requirements



Consumer Protection Laws

- Existing laws generally prohibit false advertising, unfair and/or deceptive trade practices and consumer fraud
 - These laws apply to both the nonprofit and CCVs in a CRM arrangement
- Advertising that is misleading in a material respect is unlawful:
 - both affirmative representations and failure to reveal material facts, and
 - both express and implied messages can trigger liability for deceptive advertising
 - New York state uses a reasonable consumer standard:
 - “whether the advertising or conduct at issue has the tendency or capacity to mislead, deceive or confuse.”
 - courts seek to protect "the ignorant, the unthinking and the credulous who, in making purchases, do not stop to analyze but are governed by appearances and general impressions."



FTC Guidance

- FTC guidance on online charitable giving portals:
 - Applies to online retailers (also social media hubs, crowd-funding sites, and other online platforms that provide a list of charities people can choose to support directly from the online platform)
 - Disclose:
 - where the contributions are actually going,
 - any fees that may be deducted from a donor's contribution,
 - when the contribution will be received, and
 - whether the donors' information will be shared

Source: <https://www.ftc.gov/business-guidance/resources/online-charitable-giving-portals>



Endorsements

- Potential for deceptive practices with “endorsements”
- Even a mere affiliation (without a specific disclaimer as to absence of endorsement) could be viewed as constituting an endorsement
- FTC Guides Concerning Use of Endorsements:
 - disclose any “material connection” between the endorser (the nonprofit) and the for-profit

Tip: Nonprofits should tread very carefully with CRM arrangements where they might appear to be endorsing a for-profit company



Private Benefit and Inurement

- In order to qualify for and maintain 501(c)(3) tax-exempt status, no part of the net earnings of a nonprofit can inure to any private individual
 - “Balancing test” based on facts and circumstances: the public benefit generated from an activity by a nonprofit must clearly and substantially outweigh any private benefit produced
 - A private benefit is qualitatively insubstantial if it is indirect or unintentional (e.g., a mere by-product), or if it is a necessary concomitant of a charitable activity

Tip: Review your CRM contract carefully with counsel to ensure you don't run into private benefit issues



Unrelated Business Income Tax (“UBIT”)

- Nonprofits must pay income tax on net income from unrelated business activities. Unrelated business income (“UBI”) is income from: trade or business; regularly carried on; and not substantially related to organization’s tax-exempt purpose
- No “substantial return benefit” criterion: rough rule of thumb - as soon as the proportion of UBI becomes > 10-15% of the overall budget, the arrangement should be examined very carefully to address the potential problem
- While “advertising” income is generally UBI and therefore taxable:
 - UBIT generally unlikely be an issue so long as CRM promotions are not “regularly carried on” or if the nonprofit takes a more passive role
 - if the nonprofit takes an active role in the advertising, UBIT may be triggered. Such nonprofit may want to bifurcate payments as royalty payments or qualified corporate sponsorships, which are except from UBIT



Hypo: Bob's Store and Glendale Senior Home

- Bob, a store owner, and Glendale Senior Home (“GSH”), a nonprofit senior home located next door to Bob’s store, verbally agree to a CRM arrangement:
 - Bob agrees to contribute 1% of all sales in the next 3 months as a donation to the senior center to purchase bike racks
 - Bob allows GSH to sell flowers and plants near the front of his store

Bob puts up a sign next to his cash register:

Thanks for shopping at Bob’s!
**1% of all purchases will be donated to
Glendale Senior Home**

GSH puts up a sign at its front desk:

Show your love and care!
**Pick up some GSH flowers from Glendale’s
favorite corner store – Bob’s!**

- At the end of the 3 months, Bob calculates 1% of his profits, deducts \$50 for the cost of making the signs for his store and for GSH and writes a donation check to GSH
- GSH pays Bob for the cost of the flowers and collects the revenue. The profit from the flowers becomes a steady income stream that helps GSH run its operations
- At the end of the year, the bike racks are built but the only people who use them are Bob’s relatives, who are the youngest and most mobile residents in GSH by far and the only ones who keep bikes at the senior home



CRM Contracts



Key Elements of CRM Contracts

- ✓ Charitable purposes of the nonprofit benefited by the CRM campaign
- ✓ Description of CRM activities, including geography and how the nonprofit's name and mark will be used
- ✓ Estimated number of units to be sold or used (as applicable)
- ✓ Start and end date(s) of the co-venture, and acceptable termination provisions
- ✓ Description of the calculation method for the CCV's contribution to the nonprofit (e.g. percentage of profits, fixed dollar amount per sale)
- ✓ Description of how and when the CCV will send the contribution to the nonprofit
- ✓ Representation that the nonprofit provides permission for the CCV to use the nonprofit's name and other marks
- ✓ Provisions that address protection of the nonprofit's assets
- ✓ Requirement that the CCV will provide a statutorily compliant accounting report to the nonprofit with each periodic payment and
- ✓ Requirement that the advertisements of the CCV will comply with all relevant statutes
- ✓ Provision addressing how disputes will be resolved



General Tips for CRM Contracts

- Ensure that that you have necessary approval rights regarding various elements of the CRM campaign (e.g. signage appearance, future changes to contribution structure etc.)
- Ensure that you are comfortable with the license (e.g. name, trademarks etc.) that you are granting to the CCV through the agreement
- Ensure that the rights and requirements for amending or terminating the contract are mutual and reasonable
- Ensure that the agreement covers disclosure, accounting, registration obligations that might be required by any states that are targeted for the CRM campaign



Questions?

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