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Buy One, Give One? Get Your Cause Marketing Agreements in Writing

Charities sometimes collaborate with for-profit businesses in “cause marketing” arrangements that can increase sales at a business along with donations to the charity. If your charity is fortunate enough to be the beneficiary of such a cause marketing campaign, it may need to comply with New York’s commercial co-venture requirements, including the obligation to have a written contract.

What is a commercial co-venture?

A commercial co-venture is an arrangement in which a person or company that regularly engages in trade or commerce promises that the purchase or use of its products or services will benefit a particular charity. This is sometimes called “cause marketing.”

For instance, a restaurant advertising that for every cup of coffee it sells in November it will donate \$1 to the food bank next door is engaged in a commercial co-venture. Likewise, the Charities Bureau of the New York Attorney General’s Office cautions that a company that offers to donate 10¢ for every “like” on a social media site is engaged in a commercial co-venture.¹

What are New York’s commercial co-venture requirements?

- Sign a contract:* New York law requires a business to have a written contract with the charity that will benefit from the commercial co-venture. The charity and the business should each keep a copy of the contract for three years after the end of the charitable solicitation.²
- Keep records and make them available:* The business must keep accurate books and records regarding all activities that are the subject of the contract. Those records must be maintained for at least three years after the end of the contract, and must be made available to the charity within 7 days of any request.³
- Provide an accounting:* Within 90 days after the end of the charitable solicitation, the business must provide the charity with an accounting stating: 1) the number of items sold, 2) the dollar amount of each sale, and 3) the amount paid or to be paid to the charitable organization. If the sales promotion lasts longer than one year, the business must provide the charity with an annual report containing this information.⁴

¹ New York Charities Bureau, Cause Marketing, available at https://www.charitiesnys.com/cause_marketing.html

² Exec. Law 173-a.1.

³ Exec. Law 173.2.

⁴ Exec. Law 173-a.3.

- *Report to the Charities Bureau:* The charity must report the commercial co-venture to the Charities Bureau, using Schedule 4a to the CHAR 500.⁵

What if the good or service is advertised in another state?

At least 21 states aside from New York regulate commercial co-ventures. Depending on the state in which the promotion is available, it may be necessary for the business to register with the charities regulator in that state. There may also be a requirement that the business must state in its advertisements the amount the charity will receive as a consequence of each purchase. It is important to check the laws of the relevant states before allowing a cause marketing campaign to be offered there.

What are important considerations for commercial co-venture contracts?

- *Intellectual property:* A commercial co-venture contract should protect the charity's intellectual property. For instance, it should make clear that the charity retains ownership of its name and logo. If the contract allows the business to use the charity's name and logo in the course of marketing, that permission should be restricted to the cause marketing event. The New York Charities Bureau recommends that the contract allow the charity to review all promotional materials that use the charity's name or logo.⁶
- *No endorsement/advertising:* The contract should make clear that the charity is not required to advertise or endorse the business' products, although the charity may *acknowledge* the business' support. The contract should also require the business to avoid implying that the charity endorses the business' products or services.
- *Clear terms for the charitable solicitation:* The contract should specify how the charity will benefit from the business' sales. Will the charity receive a proportion of the sales price, or a flat donation if sales reach a certain level, or will the business' donation be calculated in some other way? How long will the cause marketing last? When will the proceeds be sent to the charity?
- *Accounting for and delivering proceeds:* The contract should require the business to provide the charity with information about the number of sales made using the charity's name, the business' proceeds, and the amount transferred to the charity. Be sure to include the requirement for the business to provide such accounting within 90 days of the end of the charitable solicitation and to provide an annual report for promotions that last longer than one year.
- *Recordkeeping:* The contract should state that the business must maintain its books and records regarding the activities for a minimum of three years after the end of the contract, and must be made available to the charity within 7 days of any request.

⁵ Exec. Law 173-a.4.

⁶ New York Charities Bureau, Cause Marketing, available at https://www.charitiesnys.com/cause_marketing.html

- *Compliance with relevant laws:* The contract should require the business to comply with all applicable laws, including any applicable laws regarding commercial co-ventures and truth in marketing.

Why is it important for the charity to avoid endorsing or advertising the business' goods or services?

A tax-exempt organization that endorses or advertises a private business' goods or services runs the risk that the Internal Revenue Service will view this as providing an impermissible private benefit to the business. Advertising also increases the risk that the business' donation would be viewed as Unrelated Business Taxable Income, which would require the charity to pay tax on it. Charities should consult with their tax advisors about other steps to avoid having cause marketing revenue classified as taxable revenue.⁷

Lawyers Alliance is available to help eligible nonprofits draft and review commercial co-venture contracts. To become a client, visit www.lawyersalliance.org/becoming-a-client.

This alert is meant to provide general information only, not legal advice. If you have any questions about this alert please contact Lawyers Alliance's Resource Call Hotline at (212) 219-1800 ext. 224 or ResourceCall@lawyersalliance.org, or visit our website at www.lawyersalliance.org for further information. For his assistance in preparing this Legal Alert, Lawyers Alliance would like to thank Richard Wang of Cornell Law School.

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⁷ Internal Revenue Code 513(i) addresses the issue of when corporate sponsorship payments generate tax obligations for an exempt organization.