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Compliance Challenges In Cos.' COVID-19 Charity Marketing

By **John Feldman and Jason Gordon** (April 14, 2020, 4:35 PM EDT)

Under the terrifying light of the COVID-19 pandemic, brands want to do their part. While some companies are making masks and other protective equipment, others are partnering with charities and other relief organizations. We are seeing an uptick in cause-related marketing appeals and advertising statements.

Cause marketing is primarily regulated by state law, which varies both in technical requirements and in its applicability. At the root of all enforcement, across every state and under federal law, is the governmental interest of protecting consumers against fraud.

Fraud generally involves separating a consumer from his or her money by means of deception. Thus, the key concern when it comes to a cause-related marketing appeal is whether the marketer does what it says it is going to do.

How should you do good in the right way? For a national brand, trying to address every state law's requirements can be daunting. With registration and bonding requirements in some states, brands often express frustration when faced with a patchwork of requirements when they are just trying to help. What is the risk of just tying a brand to a charitable cause now, when it matters most?

Whether a marketing campaign is riskier or safer will depend on some basic considerations in the planning process and in execution of a charitable appeal:

- Is the appeal clear? Or, is it ambiguous as to whom the marketer plans to donate money? Is it ambiguous how much money it will donate? Is it ambiguous as to how the marketer will account for the donation (e.g., will funds be generated by applying a straight percentage to net proceeds, to gross revenue or in some other way)? Is it clear when the cause-related activity will end?
- How prominent and reliable is the charity to which the marketer is donating money? How likely is it that the charity is registered where it needs to be and has its ducks in a row with regard to handling donated funds for a particular cause? How much comfort will a regulator possess if he or she learns of the charity's identity?
- Does the marketer have a person whose job it is to account for every dollar that will be generated by the campaign? What internal controls does the marketer have in place to ensure that the money allocated to the charitable purpose is spent in accordance with the promise made in the advertising? What recordkeeping protocol is in place to ensure that the marketer



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has accurate records at its fingertips if a regulator or consumer advocate asks for information about the program?

Of course, we are not saying that brands should ignore individual state laws. We are saying that getting these issues nailed down will help a great deal in ensuring that a cause-related marketing program does not turn into an expensive regulatory or adversarial mess.

Are there laws about just giving proceeds to charity?

It comes as a surprise to some that doing good in the name of your brand can implicate many state requirements. There are technical requirements imposed by some states in connection with charitable solicitations.

A “commercial coventure,” in general, is a promotion that advertises that the purchase of a product will generate a donation to a charity. Various states’ statutes requiring disclosures, registration and bonding may be triggered if you say, for instance: “For each coffee purchased this month, we will donate \$1 to XYZ Charity.”

Some states’ commercial coventure laws are worded so broadly that they theoretically could apply to promotions that do not request a product purchase or use. For example, in Alabama and Massachusetts, promotions that do not explicitly encourage purchasing or using the advertiser’s product but only involve an interaction with the advertiser (an “event”) that is connected to a charitable donation could trigger state requirements. Even a simple text message program — e.g., “Text ‘ABC’ to 12345 and we will donate \$1 to XYZ Charity” — could come within the scope of the most broadly worded commercial coventure statutes.

The charity to which the marketer wishes to donate funds or on whose behalf it is soliciting consumer attention must be able to solicit funds in every state in which the promotion will run. An advertiser that is engaged in a commercial coventure relationship should ensure that it partners with a charity that is licensed under state law. Often, local organizations and local hospitals are not licensed to solicit funds in all 50 states.

Most national charities, including Feeding America, The Red Cross and even local hospitals with a national reputation (e.g., Memorial Sloan Kettering Cancer Center in New York City) are more reliably licensed to solicit donations nationwide. As a technical matter, partnering with registered charities will enable advertisers to register as commercial coventures much more easily.

Noncompliance with technical requirements such as registration and bonding can result in investigations, and investigations can result in enforcement. We have seen several examples where quick-service restaurants and consumer packaged goods companies have attracted attention by some states during the course of a cause-related marketing campaign. Failure to register properly, report accurate donations, disclose required information or make the donations in a timely manner have resulted in various investigations and fines.

Again, marketers are often frustrated by what sounds like a lot of red tape standing between the brand and charitable act. What factors are likely to make a state investigate?

- A competitor or consumer asking a state regulator whether a certain promotion involving a charitable appeal has been registered or is otherwise in compliance with that state’s laws.
- Widespread consumer complaints about the marketer’s brands or commercial activities particularly with regard to charitable appeals.
- Calls to action in advertising that expressly solicit funds from consumers or suggest that money is going into the marketer’s pockets but will be transferred eventually to the charity.

A state investigation usually takes the form of an official request for information about when, how and to what extent the marketer has complied with that state's charitable solicitation laws. If the marketer has placed itself in the best position in relation to the issues discussed above, the regulator might agree that there is no fire, despite the presence of smoke.

Today, during the current pandemic, regulators are prepared for both smoke and fire. The Federal Trade Commission, the Federal Communications Commission and the U.S. Department of Justice have published warnings about possible charitable solicitation scams focused on COVID-19. Many state attorneys general have published warnings to their constituents concerning charitable solicitation scams, including New York's Letitia James and California's Xavier Bacerra.

Although the focus of these warnings is more about fraud than technical commercial coventure requirements specifically, state and federal regulators may have a hair trigger if something sets them off in connection with a charitable solicitation during the current pandemic. What is a state regulator likely to do if he or she has reason to question a charitable solicitation that appears to be an unregistered or technically noncompliant commercial coventure?

He or she might require registration and an accounting of donations collected. There could be legal fees associated with this interface in order to assure the regulator that the marketer has crossed its Ts with regard to the promotional offer. The marker will need to communicate carefully and knowledgeably that consumer expectations have been or shortly will be fulfilled.

It is also possible that the regulator could require payment to settle possible charges under the state's consumer protection laws. And the regulator may publicize the violation in an unflattering press release.

To be sure, no state regulator wants an article in the paper about, for example, how red tape stopped funds from purchasing masks and gloves for healthcare workers. Having a good, solid, ready-to-go file with financial records and substantiation for a clear and limited call to action will probably go far in limiting a marketer's exposure, even in a state that might have required registration for the charitable activity contemplated.

Just keep my cause-related promotion out of harm's way!

So, let us assume your brand is on the up-and-up, and has every intention to give generously to a valid organization that is, for example, set up to help healthcare workers or others who have been injured physically or economically by the COVID-19 pandemic.

You want to associate your brand with generosity, but you do not want to engage in the technical requirements associated with commercial coventures. Your marketers spend time with legal practitioners trying to wordsmith the promotional call to action, to make it less likely that a regulator might view the promotion as a commercial coventure.

Here are some tips as to how to talk about your brand and products in conjunction with a charitable donation, while reducing the likelihood that your promotion will be a commercial coventure:

- Avoid ambiguity as to whom the donated money will benefit. Just saying that the brand is donating to or supporting "relief efforts" is ambiguous. Does it mean masks and gloves for healthcare workers? Or does it mean additional unemployment benefits for the marketer's employees?
- Avoid focusing on purchases. Try not to imply that the purchase of one or more of your products will result in an X% donation to a COVID-19 charity.
- Be as specific as you can about when you will make your donation. Think about whether you are really making a donation now — when it is needed — or later, after you have made money

from your cause-related marketing appeal, and be truthful about that timing.

- Donate to a charity people have heard of. Of course, that also means you will almost certainly need to have a contract in place at least for the use of the charity's trademark. Use that contract to nail down the specifics of the donation so that there is no confusion between the brand and the charity.
- If you want to talk about products in conjunction with your appeal, avoid tying the donation to one particular product. Mentioning an existing line or category (if you have more than one product line or category) may be less likely to be viewed as a call to purchase, as opposed to mentioning one product — especially a new promotional product — in the call to action.

There is plenty of ink being spilled on the topic of brands who are seeking to associate themselves with charitable causes related to the COVID-19 coronavirus. Doing good may be the right way to enhance your brand. Doing good the right way can help to avoid legal headaches.

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