

## REGULATION *SETH PERLMAN AND KAREN I. CHANG*

# Cause Marketing

*How far can the quid pro quo go?*

**C**ause marketing, also known as cause-related marketing or commercial co-ventures, is a commercial marketing partnership between a business and a nonprofit entity to market an image, product or service linked to a social cause or issue, for mutual benefit. The most typical example is an advertisement stating that a company will contribute a certain dollar or percentage amount of the product purchased or service used to a specified charity.

Cause marketing provides significant benefits to both the charity and the for-profit partner. The most obvious benefit to the charity is that such marketing alliances generate significant revenue for the charity. However, there are additional benefits, including the beneficial impact on the charity's mission and the enhanced visibility generated for the charity's cause or message. Marketers are investing in cause marketing to leverage the emotional bonds consumers have with causes in a manner that translates into increased purchases and brand loyalty. Cause marketing provides a way for the company to differentiate its product from ones of similar price and quality in the marketplace.

The popularity of cause marketing techniques to promote commercial products has risen significantly during the last decade. According to the 2006 Cone Millennial Cause Study, 83 percent of Millennials (consumers born between 1979 and 2001) will trust a company more if it is socially or environmentally responsible. Some 89 percent are likely or very likely to switch from one brand to another, where price and quality are equal, if the second brand is associated with a good cause.

Cause marketing campaigns come in a variety of shapes and sizes. For example:

- Olympus, a leader in the consumer electronics industry participated in a promotion last year in which 2 percent of the manufacturer's suggested retail price of all Stylus digital cameras sold, up to \$500,000, was donated to the Entertainment Industry Foundation's (EIF) National Colorectal Cancer Research Alliance.

- Yoplait just completed a promotion in which it would donate 10 cents to the Susan G. Komen Breast Cancer Foundation for every pink lid on packages of Yoplait products mailed to them before December 31, 2006. The promotion promised a minimum guaranteed donation of \$500,000, and a cap of \$1.5 million.

Unfortunately, many cause marketing promotions appear to have questionable disclosures. For example, an advertisement in *The New York Times* stated that a well-known clothing store would donate 2 percent of its nationwide store sales made on April 5, 2006 to a particular well-known charity, up to a

"guaranteed maximum" of \$50,000. This promotion is problematic in that if the \$50,000 maximum donation is guaranteed regardless of actual sales, it negates the effect of the consumer's purchase.

### REGULATION OF CAUSE MARKETING

The United States Supreme Court has made clear that charitable solicitations are inextricably intertwined with informative and persuasive speech, which receives the highest First Amendment protection. Commercial speech, unlike charitable speech, is made to facilitate private economic decisions, and is given "intermediate" constitutional protection. The government can prohibit commercial speech from being made if the restriction directly advances a substantial public interest and if the regulation is "narrowly tailored."

Cause marketing, despite its significant benefit to charities, is considered commercial speech, because the money spent by the commercial entity on the cause marketing campaign is a business expense, not a charitable donation, and is expected to produce a return on investment.

Although cause marketing is regulated as commercial speech, as opposed to charitable speech, many states regulate cause marketing relationships for many of the same reasons that charitable solicitation activity is regulated. The effort is to protect against potential consumer fraud or deception, and to ensure that the funds raised are in fact used for charitable purposes as advertised. The commercial partner of a cause marketing partnership is generally called a "commercial co-venturer" under the laws of various states in which such marketing alliances are regulated.

Federal and state consumer protection statutes often increase the legal remedies available by allowing either the consumer or the regulatory authority to bring a legal action against a company who is engaging in deceptive advertising. At the state level, attorneys general regulate consumer protection.

The Federal Trade Commission is the federal regulatory agency charged with protecting consumers. Under federal and state law, an advertisement is unlawful if it tends to mislead or deceive, even if it does not actually mislead or deceive anyone. The legal standard is whether the overall impression created by the advertisement is deceptive or misleading, not whether the ad is technically truthful.

### STATE REGISTRATION, REPORTING, AND DISCLOSURE REQUIREMENTS

Although each state has its own regulatory process for commercial co-venturers, many of the requirements imposed are the same as or similar to those in other states. Several states, however, include

unique conditions and requirements. When a national campaign is being conducted, commercial co-venturers must comply with all of the state's regulations, which is no simple task. Four states, Maine, Massachusetts, Alabama, Washington, and in limited circumstances, California, currently require commercial co-venturers to register prior to conducting a co-venture. Approximately 20 other states regulate such campaigns but do not require registration.

Registration typically includes the filing of a registration statement, payment of a filing fee, and posting of a bond. In addition to, or instead of registration, co-venturers may be required to file a written contract specifying the terms of the co-venture, prepare and file a final accounting or closing statement disclosing the gross receipts and expenditures incurred, include certain disclosures in any marketing campaign, and maintain books and records related to the co-venturer for a specified number of years.

Some states have additional provisions beyond the common requirements. For example, California requires that the designated funds be transferred to the charity at certain intervals throughout the campaign. New York requires that, for any sales promotions lasting longer than one year, the commercial co-venturer must provide the charity with an interim report, at least annually. It should be noted that New York has a statutory registration and bonding requirement, but it is specifically not enforced by the attorney general. Moreover, any registrations they receive are not accepted.

The most recent state to pass new laws regulating commercial co-ventures is New Jersey. Effective July 8, 2006, every commercial co-venture that is promoted in the state must be pursuant to a written contract, which the charity must file with the state at least 10 days prior to the start of the marketing campaign. At the conclusion of the campaign, the co-venturer must certify the amount of funds raised during the charitable sales promotion, and the amount remitted to the charity in connection with the promotion, which the charity must submit to the state, along with a copy of each advertisement used for the promotion. The advertisements must disclose the dollar amount or percent per unit of goods or services purchased or used that will benefit the charitable organization or purpose.

Some states, including Mississippi, Oklahoma, and Pennsylvania, do not directly regulate the commercial co-venturer, but do require charities to provide the state with certain information relating to commercial co-ventures. These may include providing the name and address of any commercial co-venturer and a description of the cam-

paign, specifying the payment arrangement, and filing a copy of the contract.

### THE REGULATORS' PERSPECTIVE

In April 1999, the attorneys general (AGs) of 16 states, and the District of Columbia Corporation Counsel produced a preliminary report entitled "What's in a Charity's Name?," which sought to inform entities involved with cause marketing campaigns, as well as the public, about the consumer law standards and policy considerations related to such campaigns. The AGs are primarily concerned that many cause marketing campaigns might deceive, mislead or confuse consumers.

The AGs strongly recommend clear and conspicuous disclosures of the following statements, where applicable:

- (1) the nonprofit has not endorsed the product;
- (2) the nonprofit has not determined the product to be superior, if that is the case;
- (3) the commercial sponsor has paid for the use of the nonprofit's name and logo; and,
- (4) the cause marketing relationship is exclusive.

Despite their good intentions, many of the recommended disclosures could have a strong negative impact on the effectiveness of cause marketing campaigns, thereby significantly reducing contributions given to charities through such ventures. Consumer perceptions of these joint ventures will certainly be affected if advertisements include a bevy of disclaimers.

The most effective recommended disclosure that both protects consumers and ensures that charities and commercial entities can successfully execute cause marketing campaigns, is to include a disclosure regarding the effect of the consumers' purchase on the amount of contributions the charity will receive.

A truly meaningful disclosure requires more than

the commonly used statement, "A portion of all proceeds will be given to X Charity." Moreover, the effect of the consumer's purchase may be dependent on the financial arrangement negotiated for the particular campaign. This may cause the disclosure statement currently required in many states (indicating the percentage or dollar amount of proceeds for the product purchased or service used that will be given to the charity) to be less than accurate.

For example, if a percentage of the consumers' purchase will only be given to the charity above a certain threshold, and that threshold is not met, a statement that such percentage will be given, without explaining the condition, will be misleading. Similarly, an arrangement which provides for a cap on the total amount of contributions becomes deceptive once the cap is reached, unless the capped amount is disclosed. The attorneys general have recommended that any products bearing such promotion not be sold once the cap is reached. This is not practical, however, as goods containing cause marketing promotions cannot be easily withdrawn from the marketplace.

Another problematic arrangement arises where a fixed annual payment is guaranteed. In such cases, the consumers' purchase technically has no impact. Payments should not be guaranteed when the commercial entity uses statements that a percentage or dollar amount of the consumer's purchase price will go to benefit a charitable purpose.

The BBB Wise Giving Alliance, which produces evaluative reports on charitable organizations that solicit nationally, recommends as part of its evaluation standards that any commercial entity engaged in a cause marketing promotion clearly disclose how the charity benefits from the sale of products or services. The BBB states that such promotions should disclose:

- (1) the actual or anticipated portion of the purchase price that will benefit the charity;

- (2) the duration of the campaign; and,
- (3) any maximum or guaranteed minimum contribution amount.

Although current state law only requires that the first element be disclosed to consumers, the second and third factors are also important in informing the consumer whether, and to what extent, their purchase will affect the contribution to the charity.

### HOW FAR CAN IT GO?

Although the sine qua non of a cause marketing relationship is the expectation of mutual benefit to the charity and the for-profit partner, consumers also derive a unique philanthropic benefit from knowing that their purchases help raise funds for charitable causes. No doubt, cause marketing will continue to grow in popularity so long as it continues to generate good will and significant profits to the commercial partner who often drives the relationship.

According to a 2004 survey of retailers and manufacturers that engaged in cause marketing, 81 percent of the respondents said that sales impact is a top factor when deciding whether to adopt a cause marketing program. The increasing prevalence of quid pro quo promotions may cause corporate partners to begin expecting the biggest possible bang for their buck.

As a result, commercial partners will seek to influence the decisions that affect a charity's public persona and potentially the manner in which the charities accomplish their mission. This trend will catch the eye of charity regulators, and dramatically change the current minimal level of regulatory enforcement. *NPT*

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