

Cause-Related Marketing: New Aggressive Enforcement

03.20.19 | Linda J. Rosenthal, JD



In the 1980's, the American Express company tried out an advertising technique that had not been done before. The financial services giant joined with the nonprofit organization that was leading the fundraising campaign to pay for restoring the Statue of Liberty. This experiment was a huge success for both sides.

Here's how it worked: American Express launched an advertising campaign to sign up new cardholders. American Express pledged to donate part of each credit card purchase to the nonprofit as well as an additional contribution for each new, approved credit card application.

Commonly referred to as "cause-related marketing" or "cause" marketing," this type of joint venture between a business and a 501(c)(3) has surged in popularity over the years and is now a billion dollar industry. It's been described as the "model of choice for collaborations between nonprofit organizations and for-profit companies."

In many ways, cause-related marketing spawned the birth of social enterprise.

Many states, including California, have approved these arrangements but also passed laws regulating cause-related marketing campaigns and the professionals who facilitate them. There has been little oversight or enforcement, though: only a 1999 report issued by the Federal Trade Commission (FTC) along with sixteen state Attorneys General and the District of Columbia Corporation Counsel that raised regulatory concerns about false advertising, consumer fraud, and deceptive trade practices arising from certain commercial-nonprofit product advertisements.

Now, for the first time in almost two decades, there is official, decisive action by regulators. In the summer of 2018, a coalition of 12 states entered into a settlement agreement with a Tennessee

nonprofit (and perhaps eventually its for-profit partner) for a cause-related marketing project regulators proved was a nationwide attempt to violate state charitable solicitation laws.

Cause-Related Marketing

These cause-related projects can take one of several formats, the most common being the simplest and most direct: telling the general public that a set portion of the sale proceeds of a product or service will be donated to a designated charity.

Sometimes there will be a special promotion: for example, the sale of color-coded items including pink to support breast cancer research nonprofits and red to support HIV/AIDS prevention. Other popular variations include:

- Purchase Plus: Customers are asked at a checkout line to add a small donation to the bill.
- Licensing of Logo or Brand: An example is the American Heart Association certifying that a product meets its standard for heart health.
- Social or public service marketing: Using marketing principles and techniques to encourage behavior change in a particular audience: for instance, the American Cancer Society and Novartis partnering on their Great American Smokeout campaign.

The nonprofit, of course, receives the windfall of substantial financial support without having to do much else other than consent to joining in this arrangement and allow the for-profit business to announce to the general public that a percentage of sales will be donated to the charity. (It's important for the nonprofit to remain as passive a partner as possible in order to avoid the IRS claiming that the activity constitutes an unrelated business activity, subject to the unrelated business income tax.)

The for-profit business benefits from the "halo effect" of being associated in the public's mind with a worthy cause; the marketing campaign generally has the effect of boosting sales of the firm's product line.

Tennessee Case

The case that caught the eye (and ire) of regulators around the nation is the campaign by a Tennessee nonprofit, Operation Troop Aid (OTA), and its "commercial co-venturer" Harris Jewelers. The organization entered into a settlement agreement acknowledging it had engaged in a nationwide cause-related marketing campaign that violated state charitable solicitation laws in the following ways:

- Failing to properly oversee its commercial co-venturer which had advertised on its website and in its retail stores that, for each teddy bear purchased, it would donate a specific amount of money to Operation Troop Aid for the express purpose of sending care packages to service members;
- Failing to segregate the funds as restricted;
- Using these funds for purposes other than those expressly represented as its charitable purposes;

- Spending funds on non-charitable purposes; and
- Engaging in unfair, false, misleading or deceptive solicitation and business practices.

More specifically, Operation Troop Aid did not meet its oversight duty of Harris Jeweler's "Operational Teddy Bear"; it never requested an accounting of the numbers of bears sold or any other information to determine that the per-bear dollar figure sent by Harris Jewelers to OTA was accurate. Nor did the nonprofit provide Harris Jewelers with information on how the funds donated by the company were used or how many care packages were sent to service members.

Operation Troop Aid also admits it spent funds on non-charitable purposes and took these actions without any discussion, approval, or oversight by its board of directors. The organization has agreed to cease operating and wind down its operations. CEO Mark Woods is barred from serving as a fiduciary or soliciting for any nonprofit. There will be civil penalties against the organization as well, and OTA has agreed to continue helping authorities in their continued investigation of Harris Jewelers.

Conclusion

This aggressive, multi-state enforcement action should be a wake-up call for the many charities around the nation which have cause-related marketing campaigns. Important steps to take include: having a comprehensive written agreement requiring compliance with law (and verification) by both sides; reviewing the business co-venturer's advertisements; and adopting adequate procedures and controls to deal with restricted donations.

— *Linda J. Rosenthal, J.D., FPLG Information & Research Director*