



November 2017

## **Giving Tuesday: A Time for Cause-Related Marketing**

First there was Black Friday. Then came Cyber Monday. Now, “Giving Tuesday” is the latest holiday season retail event. Celebrated on the Tuesday after Thanksgiving, Giving Tuesday marks an unofficial start for the charitable season when many individuals – and an increasing number of companies and brands – focus on holiday and year-end charitable giving.

Economic and social realities today push many companies and brands to act as good corporate citizens. Cause-related marketing can support that goal. It’s also good business. Studies show that a sizable number of consumers may change purchasing behavior to select products and services associated with causes they care about.

Cause-related marketing takes many forms. Examples include requesting customer donations at checkout, selling a product with an offer to make a donation for each purchase, auctioning special items online, inviting consumers to “vote” for charities to receive grants, and promising to make a donation for certain online “free” actions, such as retweeting a message, or engaging on other social media outlets.

What many companies don’t always know, however, is that legal regulations may apply to cause-related marketing efforts. Below is a short summary of some of the key compliance steps for the three most popular and common types of cause-related marketing.

## Charitable Sales Promotion

A “charitable sales promotion” occurs where an item is offered for sale with a representation that the purchase of the item will benefit a charitable organization or purpose. The technical term for the commercial party making the offer is “Commercial Coventurer” (CCV). The basic requirements are as follows:

- Written Contract with the Charitable Organization. Approximately 20 states require a contract. Some specify certain provisions for the contract. A partial list of such provisions includes: accurate description of the offer to be made to the public, the charity’s right to an accounting of the program results, termination rights for the charity, citation to the state’s laws, an estimate of the total donation, and signature by two officers of the charity.
- Per-Unit Disclosure of Donation Amount. Approximately 11 states require ads to disclose the amount of the donation, on a per-unit basis, typically either “as a dollar amount or as a percentage of the value of the goods or services purchased or used.” The CCV should avoid describing the donation as a “portion” or “percentage” of “proceeds” or “profits” or any other amount the consumer cannot calculate. Of course, any other necessary details also should be disclosed, such as an end-date for the offer, specification of exactly which products are covered by the offer, etc.
- Disclosure of Beneficiary. The name of the benefiting charity should be disclosed along with contact information for that organization, and the purpose for which the donated funds will be used.
- Registration and Bonding. A CCV has a duty to register, post a bond, and file an annual report in Massachusetts and Alabama; Illinois requires registration and annual reporting as a “charitable trust;” South Carolina and Mississippi require registration but no bond; and Hawaii requires a simple notice of the promotion. The charity has a separate duty to file a copy of the contract in a few states, and also a general background duty to be registered for general fundraising purposes in all states with general charitable solicitation registration laws (there are approximately 38).

In addition, if a cap applies to the offer, the CCV should have a mechanism to shut down the offer if/when the maximum donation has been reached. Conversely, if a guaranteed minimum donation has been promised to the charity, care should be taken to avoid setting that minimum so high as to make anticipated consumer purchases unlikely to affect the donation amount. Finally, if a flat donation amount is being given, the program should not be described as generating a donation based on purchases. Instead, just advertise that the company is a proud sponsor of the charity, disclose the total amount of the company’s donation, and consider including an affirmative disclosure that purchases do not affect the donation. These precautions can help reduce the risks of claims of false or misleading advertising.

## Free-Action Program

A “free-action program” is the offering of a donation when a consumer takes a totally free action without any purchase or payment required. Examples include retweeting a message, enrolling as a member on a website, downloading a free mobile app, etc.

While it is theoretically possible for CCV laws in a small minority of states to apply to a free-action program, state regulators (all CCV laws are state laws) generally do not interpret or enforce these laws to apply where the consumer is not required to spend any money. Nevertheless, any company making such an offer still needs to avoid engaging in false or misleading advertising. Plus, if the name of a charity will be included in the advertising, permission normally is needed from the charity. Best practices include the following:

- Contract with Charity. Consider creating a CCV-style contract with the charity, though some details can be omitted. Also, check the terms of use of any social-media platform on which the offer will be run to make sure the program doesn't violate such terms.
- Clear Disclosures. Just as with a CCV program, the offer should disclose the exact amount to be donated for each free action consumers take, along with any other necessary details for the consumer to understand the terms of the offer. Caps and minimums should be handled in similar fashion to a CCV offer as described above.
- Work with a Registered Charity. Since the program represents a form of fundraising on behalf of the benefitting charity, the sponsor should confirm that the charity has registered itself for general fundraising purposes in all states with general charitable solicitation registration laws (there are approximately 38).

### Donation at Checkout

A donation-at-checkout program is where the consumer is invited to make a voluntary donation separate and apart from the purchase price of a product. Such invitations generally are not covered by the CCV laws (though they theoretically could be in tiny number of states). The greater concern is that, if the company is not careful, it can subject itself to the far more onerous laws applicable to professional fundraisers. To help minimize risks, the following guidelines are recommended:

- Contract with Charity. The contract assures the ability to use the charity's name. It also is where the two parties can specify that the company will act as an agent of the charity for purposes of receiving (and temporarily holding) consumer donations intended for the charity. Such agency status is important; it helps assure that the donors can claim tax deductions for their donations.
- 100% Pass-Through of Funds. The company should not keep any of the donated money. Nor should it be compensated in any way by the charity. If the company receives any compensation at all (even reimbursement of costs), the risk increases of being deemed subject to the professional fundraiser laws, which include many onerous registration, bonding, reporting, and other requirements. Ideally, money should be passed to the charity as quickly as possible.
- Track Funds. A reliable system should be implemented to keep track of all consumer donations to assure that 100 percent of the donated funds are delivered to the charity on a regular and timely basis. Creating an SKU for donation transactions to run through the company's cash-register system often is a good solution.
- Disclose Charity Information. Several states have special disclosure requirements when consumers are asked to make donations. A common format is to list the postal address and/or phone number of the state registration office (Attorney General or Secretary of State) where information about the charity can be obtained. Many charities, however, are comfortable simply listing their own website address – at least where the website includes the charity's tax returns (which are public documents) and annual financial reports. While not following the letter of the disclosure laws, this approach fulfills the purpose and spirit of the laws by giving consumers quick, easy and direct access to the bulk of the same information typically available by contacting the state. Since the charity bears the disclosure duty, the company should reach agreement with the charity on the form of disclosure the charity is comfortable posting.

## Authors

This GT Alert was prepared by **Ed Chansky** and **Erica L. Okerberg**. Questions about this information can be directed to:

- **Ed Chansky** | +1 702.599.8016 | [chansky@gtlaw.com](mailto:chansky@gtlaw.com)
- **Erica L. Okerberg** | +1 702.599.8073 | [okerberge@gtlaw.com](mailto:okerberge@gtlaw.com)
- Or your **Greenberg Traurig attorney**

Albany. Amsterdam. Atlanta. Austin. Boca Raton. Boston. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Germany.<sup>~</sup> Houston. Las Vegas. London.\* Los Angeles. Mexico City.+ Miami. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Sacramento. San Francisco. Seoul.<sup>∞</sup> Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv.<sup>^</sup> Tokyo.<sup>²</sup> Warsaw.<sup>-</sup> Washington, D.C.. West Palm Beach. Westchester County.

*This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ~Greenberg Traurig's Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. \*Operates as a separate UK registered legal entity. +Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ∞Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. ^Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. ²Greenberg Traurig Tokyo Law Offices are operated by GT Tokyo Horitsu Jimusho, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ~Greenberg Traurig's Warsaw office is operated by Greenberg Traurig Grzesiak sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in Greenberg Traurig Grzesiak sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2017 Greenberg Traurig, LLP. All rights reserved.*