Commercial Co-Ventures and Cause Related Marketing

If your nonprofit makes an arrangement with a business to receive a percentage of sales – or if a business offers that deal to your nonprofit – beware. In at least 22 states, that's a regulated activity that may require a special registration filing. This type of activity is sometimes referred to as "charitable sales promotion" and sometimes as a "commercial co-venture."

There is nothing wrong with crafting an arrangement with a for-profit business for a nonprofit to receive a percentage of sales. However, it would be naïve to ignore the fact that for-profit businesses can benefit when consumers are motivated to purchase goods or services by the thought that they are making a donation to a charitable nonprofit. Studies show that consumers are motivated to make purchases if they believe that a percentage of sales will go to a good cause, hence the name, "Cause-related marketing." Consequently, state regulators have an interest in protecting charitable nonprofits from being taken advantage of, and protecting consumer's expectations about where the money will end up.

The law surrounding charitable sales promotions/cause-related marketing and "commercial co-ventures" is evolving.

> A commercial co-venturer is any person or firm who for profit regularly conducts a charitable sales promotion or underwrites, arranges or sponsors a sale, performance or event of any kind which is advertised to benefit a charitable organization.

– Copilevitz & Canter

The IRS Form 990, Part VI, asks whether the organization invested in, contributed assets to, or participated in a joint venture or similar arrangement with a taxable entity during the year. If "Yes," the Form 990 then asks whether the organization followed a written policy or procedure requiring the organization to evaluate its participation in joint venture arrangements under applicable federal tax law, and take steps to safeguard the organization's exempt status with respect to such arrangements.

Be aware that cause-related marketing is a regulated activity in several states. Typically, state laws require nonprofits to file a copy of the contract governing the arrangement before any sales take place. Because state laws vary, your nonprofit will want to be familiar with the laws governing charitable solicitation registration in general, and specifically those regulating commercial co-ventures and/or cause related marketing. Failure to register can lead to fines, and, in some states, even criminal penalties. Bottom line: know your state's law and document the arrangements with the for-profit so that there is accountability for the sales promotions.

Practice Pointers

- Commercial co-ventures can also exist *between two charitable nonprofits* that agree to sell something jointly and agree that a percentage of the sales will go to one or the other of the nonprofits. Sometimes this transaction is structured as a license agreement.
- It is common for the other partner to a sales promotion (usually a for-profit entity) to be unaware that making an agreement to donate a percentage of sales to a charitable cause is regulated by state law. This means that it's up to the charitable nonprofit to educate the other entity and make sure that state laws are followed, especially since non-compliance puts the nonprofit at risk!
- Keep your antennae out for any risk of private benefit.

- We recommend that anytime there is an agreement to contribute a portion of sales to a nonprofit, the nonprofit and the other party commit the arrangement to writing in order memorialize the responsibilities of each party, and how the contributions/revenue will be split between the two (or more) parties.
- How long with the sales promotion go on? If the event is a one-time-only sales event, state law is less likely to require registration than if the sales promotion is ongoing. But know the state's law!
- Consider what will happen in the event that anticipated sales do not reach certain levels – will the nonprofit still receive the promised percentage of sales? This may be a term to include in the agreement.
- Some states require nonprofits to file written reports on units sold and income received Consequently, the nonprofit may need detailed sales reports from the for-profit/other partner.
- What are the nonprofit's responsibilities in connection with promoting the sales? What are consumers being told? Does the nonprofit have the discretion to approve communications about the sales promotion?
- Be aware of conflicts of interest with board members and other “insiders” who also have an interest in the for-profit business. Any transaction resulting in private benefit/private inurement can trigger penalties for the nonprofit and those receiving excess benefit.

Related Insights & Analysis

- Be aware of legal issues relating to corporate sponsorships.
- Read more about ethical fundraising practices.
- Your state association of nonprofits can be a resource on fundraising laws in your state.

Additional Resources

- 5 Best Practices for Transparent Cause Marketing (New York Attorney General)
- Keeping Up With Charitable Sales Promotions (Adler & Colvin)
- Terms to consider including in a commercial co-venture agreement (Jeremy Chen, Esq.)

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