



## 711 Regulation of Fund Raising

**Robert R. Amberg**  
*Senior Vice President & General Counsel*  
Retirement Housing Foundation

**Peter V Berns**  
*Executive Director*  
Maryland Association of Nonprofit Organizations

**Bruce R. Hopkins**  
*Attorney*  
Polsinelli Shalton Welte Suelthaus PC

**Nicole R. Pierce**  
*Associate Corporate Counsel*  
American Cancer Society, Inc.

## Faculty Biographies

### Robert R. Amberg

Robert Amberg is senior vice president and general counsel of Retirement Housing Foundation's (RHF's), in Long Beach, California. In this capacity, he oversees the human resources, risk management, corporate compliance, quality assurance and law departments as well as all legal affairs for RHF, one of the nation's largest private nonprofit provider of homes for the elderly, persons with disabilities and low income families. He began service for RHF as general counsel, was appointed vice president and later senior vice president.

He previously served as vice president and assistant general counsel for Comprehensive Care Corporation, staff attorney for Westworld Community Healthcare, Inc., and general counsel for Island Resorts, Inc. Mr. Amberg was a partner in Amberg and Townsend, a San Francisco law firm.

Mr. Amberg serves on the legal committee for the American Association of Homes and Services for the Aging, and on the board of directors of the Council for Health and Human Service Ministries of the United Church of Christ. He is a licensed California Real Estate Broker.

He received a B.S from Southern Illinois University in Carbondale, Illinois and his J.D. from Lincoln University Law School in San Francisco.

### Peter V Berns

Peter V. Berns is executive director of the Maryland Association of Nonprofit Organizations and CEO of the national Standards for Excellence Institute. Maryland Nonprofits is a statewide association of 1550 nonprofits. The Standards for Excellence Institute is an operating division created to replicate nationwide the association's standards for excellence program.

Mr. Berns is an attorney with a long history of community service. Prior to becoming executive director of Maryland Nonprofits he was the deputy chief of the consumer protection division of the Office of the Attorney General of Maryland, where he was responsible for supervision of the law enforcement, consumer education, complaint mediation, and legislative advocacy activities. Before moving to Maryland he provided legal representation to nonprofit groups in Washington, DC.

Mr. Berns serves on the board of Business Volunteers Unlimited Maryland. In recent years he has served on the boards of the National Council of Nonprofit Associations, the Waldorf School of Baltimore, Maryland Food Committee, Public Justice Center, Baltimore Jewish Council, the American Civil Liberties Union of Maryland, and on a variety of government task forces and councils. He was named to the Nonprofit Times Power and Influence Top 50 in 2000, 2002, 2003 and 2004.

Mr. Berns received his B.A. in psychology, magna cum laude, from the University of Pennsylvania. He received his J.D., cum laude, from Harvard Law School and has an LL.M in advocacy from Georgetown University Law Center.

### Bruce R. Hopkins

Bruce R. Hopkins is an attorney at Polsinelli Shalton Welte Suelthaus PC in Kansas City, Missouri. He specializes in the areas of corporate law and taxation and emphasizes the representation of nonprofit organizations. His clients include charitable and educational organizations, associations, colleges, universities, hospitals, other health care providers, religious organizations, business and professional associations, and private foundations. He serves many nonprofit organizations as general counsel; others use his services as special tax and/or fundraising counsel. Mr. Hopkins' experience includes the establishment and qualification for tax exemption of nonprofit organizations, the establishment and operation of charitable and fundraising programs, and advice on matters such as public charity/private foundation qualification, intermediate sanctions, lobbying, political activities, the unrelated business income rules, and the involvement of nonprofits in partnerships and other joint ventures. His practice also encompasses collateral areas of law, such as postal laws and charitable fundraising regulation.

Mr. Hopkins is the author of fourteen books, the co-author of four books, and the author of the monthly newsletter, Bruce R. Hopkins' Nonprofit Counsel. He has also presented at one-day seminars on tax-exempt organization law at the Professional Education Systems Institute, LLC and at many annual conferences and seminars at Georgetown University Law Center's annual conference on the law of tax-exempt organizations, of which he is a past chair. He was also a professional lecturer in law at George Washington National Law Center.

Mr. Hopkins received his B.A. from University of Michigan and his J.D. and LL.M. from George Washington University National Law Center.


### Nicole R. Pierce

Nicole R. Pierce is associate counsel for the American Cancer Society. Her responsibilities include negotiating cause marketing contracts, fundraising agreements, employee benefits agreements, and advising the American Cancer Society on corporate governance matters.

Prior to joining the American Cancer Society, Ms. Pierce was an associate practicing corporate law at the firm of Kilpatrick Stockton LLP.

Ms. Pierce received a B.A., magna cum laude, from Florida State University and a J.D., with honors, from The University of Florida College of Law.

**STANDARDS FOR EXCELLENCE:  
AN ETHICS AND ACCOUNTABILITY CODE FOR  
THE NONPROFIT SECTOR**



**Peter V. Berns  
711: Regulation of Fundraising  
Association of Corporate Counsel  
October 18, 2005**

## **Why self-regulation should be on your radar screen!**

- Legislative and regulatory scrutiny is at an all time high.
- National and local scandals are hurting public confidence in nonprofit organizations.
- Growth in the number of nonprofits.
- A public growing distrustful and confused about who to support.
- Gaps between expectations and performance.

## **Legislative and Regulatory Scrutiny at a High Point**

- US Senate Committee on Finance
  - Hearings on Charity Oversight and Reform
- US House of Representatives Committee on Ways and Means
  - Hearings on the Tax Exempt Sector
- Internal Revenue Service
- Joint Committee for Purchase/JWOD
- State Attorneys General, proposals in 19 states

## **June 22, 2004 Hearing on Charity Oversight and Reform**

“(F)ar too many charities have broken the understood covenant between the taxpayers and nonprofits – that charities are to benefit the public good, not fill the pockets of private individuals.”

Senator Charles Grassley  
Chairman, Senate Finance Committee

“While many charities are focused on doing good works and preserving the public trust, there have been a number of high-profile examples of problems in this expanding sector. ... This proliferation of sloppy, unethical and criminal behavior is unacceptable. It has led to a crisis in confidence.”

Senator Max Baucus  
Ranking Minority Member

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## **Scandals and increased public attention.**

- 1988 - PTL Ministries (Jim & Tammy Baker) collapses among allegations of sexual liaison and payoff with church funds.
- 1992 - Aramony defrauds United Way of \$1.2 million.
- 1994 - NAACP executive resigns after disclosure of payments to employee who was alleging sexual harassment.
- 1995 - Foundation for New Era Philanthropy declares bankruptcy. \$100 million lost by 160 charities.

## **Scandals and increased public attention.**

- 1998 – 6 charity officials plead guilty or no contest to embezzlement/fraud of \$15 million from Goodwill Industries in Santa Clara County, CA.
- 2001 – American Red Cross criticized for “ignoring intent of donors” in planned use of \$260 million in 9/11 donations.
- 2002 – Clara Hale, founder of Hale House in Harlem charged with stealing \$1 million from the charity.

## Scandals and increased public attention.

- 2005 – Washington Post series questions land transactions between Nature Conservancy and its board members and other practices
- 2003 & 2004 – San Jose Mercury News and Boston Globe criticize excessive compensation and spending by foundations.
  - “‘Maybe the homeless people in Dallas need their soup more than our trustees need their plane.’ But, he added, ‘I don’t think it’s valid.’”
- 2004 – Catholic HealthCare West reported to make \$2m interest free loan to CEO. Majority of repayment waived if tenure exceeds 5 years.

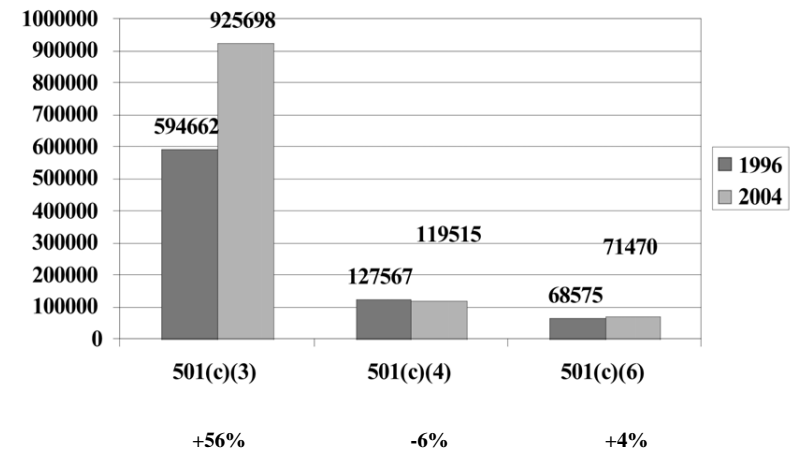
## Scandals and increased public attention.

- 2005 – Ameridebt pays \$6 million in FTC settlement amid bankruptcy and allegations involving related for-profits.
- 2005 – Big game hunters alleged to use phony appraisals to net large tax deductions for donations of trophies to museums.

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## Growth in US Nonprofits by Type

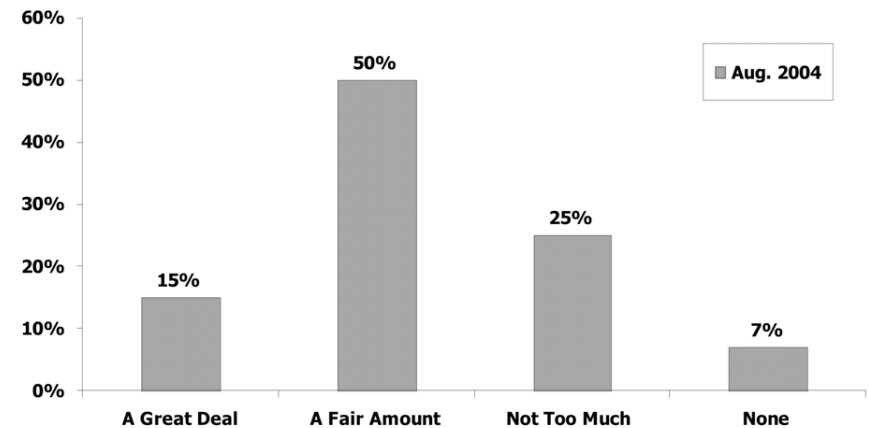




## Why self-regulation should be on your radar screen!

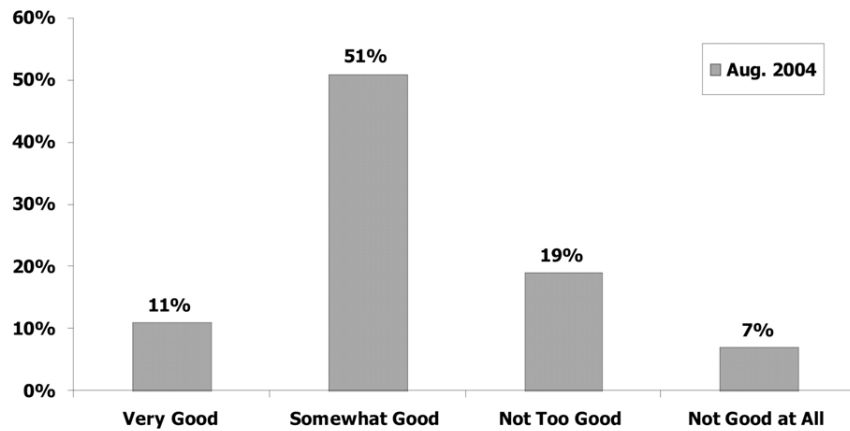
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## How much confidence do you have in charitable organizations?



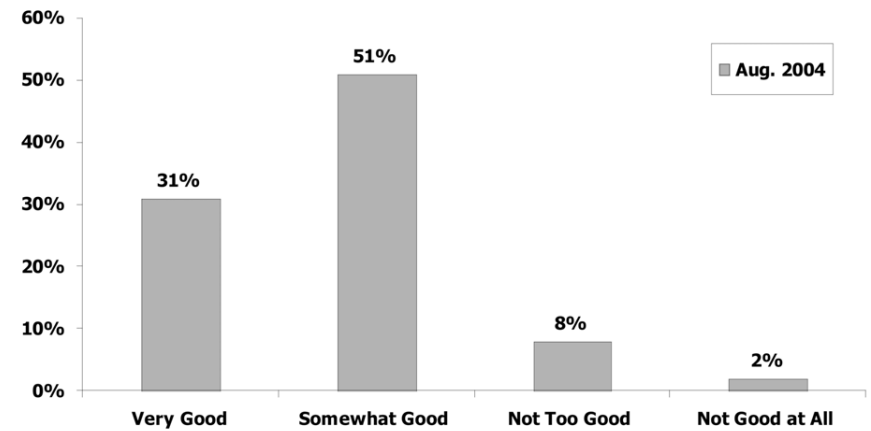
Source: Light, Paul. "Fact Sheet on the Continued Crisis in Charitable Confidence." NYU & Brookings Institution, September 2004.

### How good a job do charities do at spending money wisely?



Source: Light, Paul. "Fact Sheet on the Continued Crisis in Charitable Confidence," NYU & Brookings Institution, September 2004.

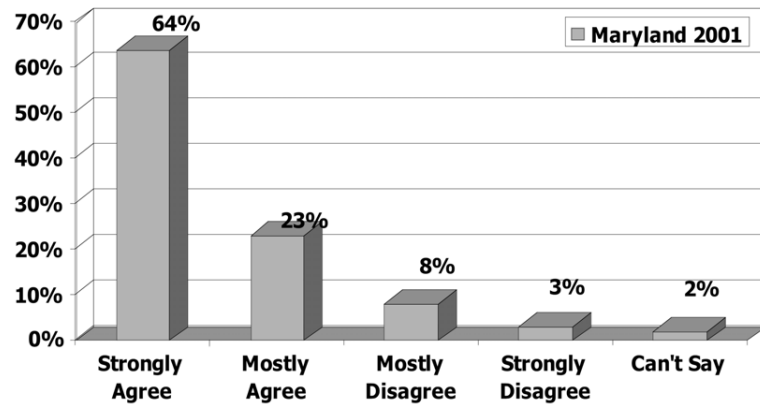
### How good a job do charities do at helping people?



Source: Light, Paul. "Fact Sheet on the Continued Crisis in Charitable Confidence," NYU & Brookings Institution, September 2004.

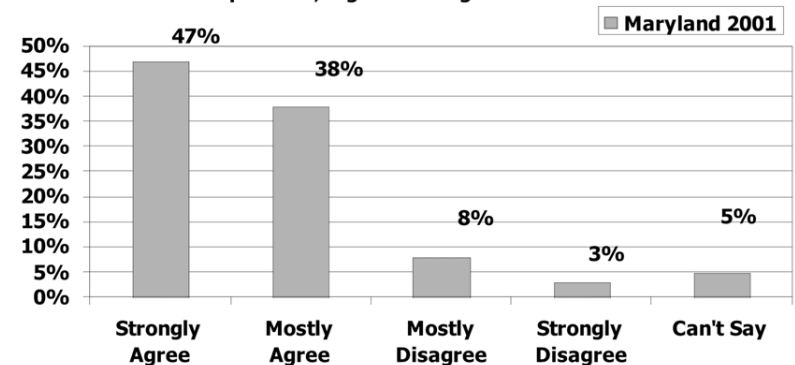
## The public is distrustful of charities they don't already know.

"When I get a phone call from a charity I've never heard of asking for money, I worry that I might be getting scammed."

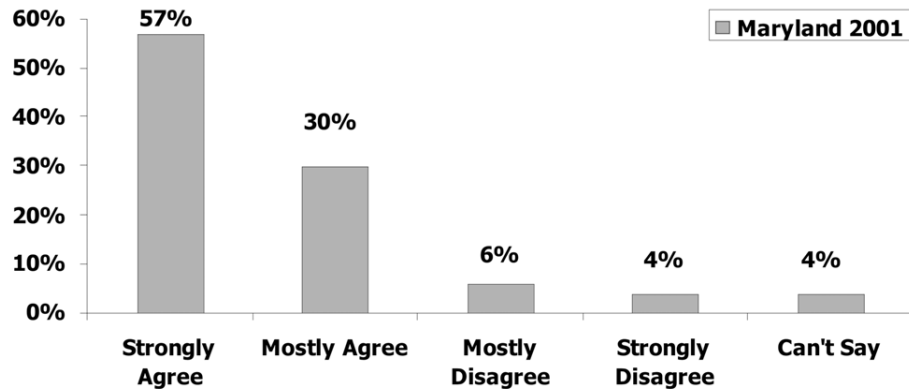


## The public is having difficulty determining what organizations to support.

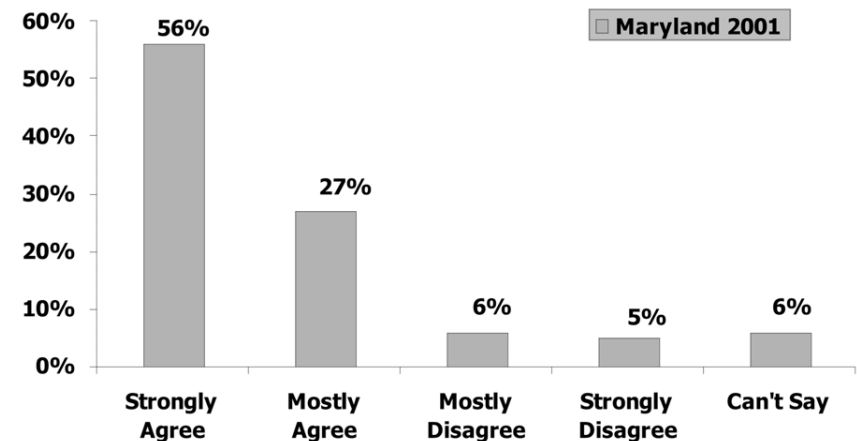
"It's getting more and more difficult to be sure that these new charities that contact me for the money are responsible, legitimate organizations."



**"I don't have time to do the research.... wish there was somewhere I could find out which ones are legitimate, which charities spend their money the best, are most effective...."**



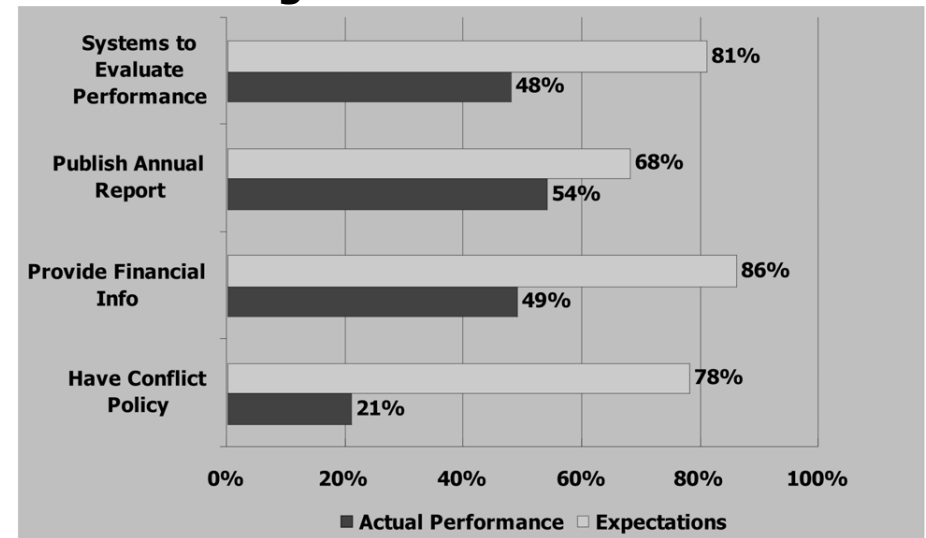
**"I wish there were some book or even an Internet site where I could check to be sure that I'm giving to a worthy cause."**



## Why self-regulation should be on your radar screen!

- Legislative and regulatory scrutiny is at an all time high.
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- Growth in the number of nonprofits.
- A public growing distrustful and confused about who to support.
- Gaps between expectations and performance.

## Gap Exists Between Expectations and Performance in Nonprofit Management and Governance

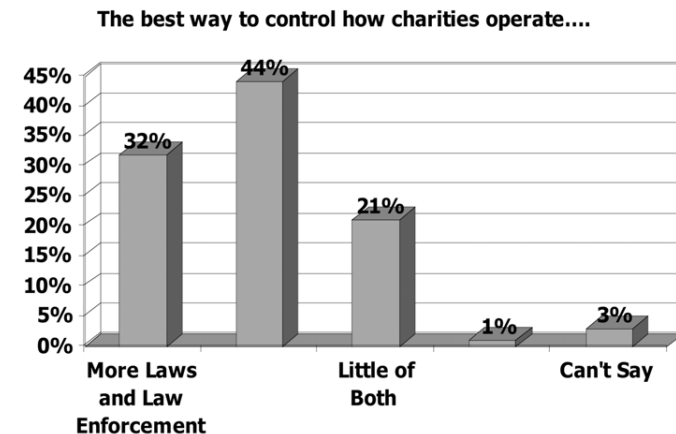


Private Action/Public Good: Maryland's Nonprofit Sector in a Time of Change, 1997.

## Why self-regulation should be on your radar screen!

- Legislative and regulatory scrutiny is at an all time high.
- National and local scandals are hurting public confidence in nonprofit organizations.
- Growth in the number of nonprofits.
- A public growing distrustful and confused about who to support.
- The public supports self-regulation.

## The public believes that both government regulation and nonprofit sector self regulation are important.



**Eighty-six percent (86%) of respondents indicated that a charity having a “seal of approval for ethical standards and accountability given by a reputable association” of nonprofits would be important to them in making giving decisions.**

## **US Senate Finance Committee Supports Concept of Self - Regulation**

- Discussion draft recommends that Congress appropriate:
  - \$10 million to support nonprofit sector led accreditation programs, such as Standards for Excellence.
  - \$25 million to support nonprofits that educate other nonprofits about best practices.=

## **Standards for Excellence History**

- 1998: Standards program launch in Maryland
- 2001 to 2003: Pilot project to replicate the program in five other states.
- June 2004: Launch of national initiative.

## **The Standards for Excellence: An Ethics and Accountability Code for the Nonprofit Sector**

A blueprint for well managed and responsibly governed nonprofit organizations



## **Standards for Excellence**

- 8 Principles & 55 Standards
  - Mission and Program
  - Governing Body
  - Conflict of Interest
  - Human Resources
  - Financial & Legal
  - Openness
  - Fundraising
  - Public Policy & Public Affairs

## **Nonprofit Education Program**

- Training Programs for Nonprofits
- Train the Trainer/Consultant
- 22 Educational Resource Packets
  - “how to” guide
  - sample forms and policies
- One-to-one technical assistance

## Voluntary Certification Program

- Organizations submit application package; application fee
- Application as a Learning Process
- Staff assisted Peer Review Process
- Certification good for three years
- Approved organizations licensed to display the Standards for Excellence seal





# preamble



America's nonprofit sector is committed to public service. Hard at work in communities across the country, nonprofit organizations are serving and meeting the needs of our citizens and strengthening our communities.

The success of nonprofit organizations depends upon public confidence and broad public support. Nonprofits are supported by individuals, corporations and foundations through charitable contributions and volunteer efforts; by government through contracts and grants; by consumers through purchases and fees; and by the general public through state and federal tax laws.

The Standards for Excellence Institute is committed to raising the level of ethical and accountable practices in nonprofit organizations. Therefore, the Standards for Excellence Institute has released these **Standards for Excellence (Standards)** to serve as a model for nonprofit organizations to implement in their operations and governance.

Nonprofit organizations must comply with applicable local, state, and federal laws. These **Standards** build upon that foundation, and go a step further. Based on fundamental values - such as honesty, integrity, fairness, respect, trust, compassion, responsibility, and accountability - these **Standards** describe how nonprofits should act to be ethical and accountable in their program operations, governance, human resources, financial management and fundraising. Eight (8) Guiding Principles are provided, along with fifty-five (55) standards - more detailed performance benchmarks that will enable nonprofits to strengthen their operations.

The Standards for Excellence Institute is dedicated to helping individual nonprofit organizations and the nonprofit sector live by the **Standards for Excellence**. The Institute provides educational programming and a voluntary leadership-based certification initiative by which nonprofits are evaluated based on their compliance with the performance indicators outlined in these Standards.

The **Standards for Excellence** are intended to describe how the most well managed and responsibly governed organizations should, and do operate. They provide benchmarks to determine how well an organization is fulfilling its obligations to those who benefit from its programs, to contributors, and to the public. All nonprofit organizations are encouraged to pledge to commit to the Guiding Principles of the **Standards for Excellence** and to work toward implementing the practices and principles outlined.

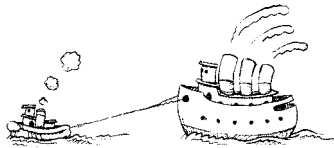


**I. MISSION AND PROGRAM**

Nonprofits are founded for the public good and operate to accomplish a stated purpose through specific program activities. A nonprofit should have a well-defined mission, and its programs should effectively and efficiently work toward achieving that mission. Nonprofits have an obligation to ensure program effectiveness and to devote the resources of the organization to achieving its stated purpose.

**II. GOVERNING BODY**

Nonprofits are governed by an elected, volunteer board of directors that should consist of individuals who are committed to the mission of the organization. An effective nonprofit board should determine the mission of the organization, establish management policies and procedures, assure that adequate human resources (volunteer and/or paid staff) and financial resources (earned income, government contracts and grants, and charitable contributions) are available, and actively monitor the organization's financial and programmatic performance.



**III. CONFLICT OF INTEREST**

Nonprofit board and staff members should act in the best interest of the organization, rather than in furtherance of personal interests or the interests of third parties. A nonprofit should have policies in place, and should routinely and systematically implement those policies, to prevent actual, potential, or perceived conflicts of interest.

**IV. HUMAN RESOURCES**

A nonprofit's relationship to its employees and volunteers is fundamental to its ability to achieve its mission. Volunteers occupy a special place in nonprofit organizations, serving in governance, administrative and programmatic capacities. An organization's human resource policies should address both paid employees and volunteers, and should be fair, establish clear expectations, and provide for meaningful and effective performance evaluation.

**V. FINANCIAL AND LEGAL**

Nonprofits must practice sound financial management and comply with a diverse array of legal and regulatory requirements. A nonprofit's financial system should assure that accurate financial records are kept and that the organization's financial resources are used in furtherance of the organization's charitable purposes. Organizations should conduct periodic reviews to address regulatory and liability concerns.

**VI. OPENNESS**

Nonprofits are private corporations that operate for public benefit with support from the general public. As such, they should provide the public with information about their mission, program activities, and finances. A nonprofit should also be accessible and responsive to members of the public who express interest in the affairs of the organization.

**VII. FUNDRAISING**

Charitable fundraising provides an important source of financial support for the work of most nonprofit organizations. An organization's fundraising program should be maintained on a foundation of truthfulness and responsible stewardship. Its fundraising policies should be consistent with its mission, compatible with its organizational capacity, and respectful of the interests of donors and prospective donors.

**VIII. PUBLIC AFFAIRS AND PUBLIC POLICY**

Nonprofits provide an important vehicle through which individuals organize and work together to improve their communities. Nonprofits should represent the interests of the people they serve through public education and public policy advocacy, as well as by encouraging board members, staff, volunteers and constituents to participate in the public affairs of the community.



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# mission and program

*Nonprofits are founded for the public good and operate to accomplish a stated purpose through specific program activities. A nonprofit should have a well-defined mission, and its programs should effectively and efficiently work toward achieving that mission. Nonprofits have an obligation to ensure program effectiveness and to devote the resources of the organization to achieving its stated purpose.*

**A. Mission**

- (1) The organization's purpose, as defined and approved by the board of directors, should be formally and specifically stated. The organization's activities should be consistent with its stated purpose.

**B. Organizational Evaluation**

- (1) A nonprofit should periodically revisit its mission (e.g. every 3 to 5 years) to determine if the need for its programs continues to exist. The organization should evaluate whether the mission needs to be modified to reflect societal changes, its current programs should be revised or discontinued, or new programs need to be developed.

**C. Program Evaluation**

- (1) A nonprofit should have defined, cost-effective procedures for evaluating, both qualitatively and quantitatively, its programs and projects in relation to its mission. These procedures should address programmatic efficiency and effectiveness, the relationship of these impacts to the cost of achieving them, and the outcomes for program participants. Evaluations should include input from program participants.
- (2) Evaluations should be candid, be used to strengthen the effectiveness of the organization and, when necessary, be used to make programmatic changes.

**D. Program Service**

- (1) In providing its programs or services, a nonprofit should act with the utmost professionalism and treat persons served with respect. Where appropriate, a nonprofit should have policies in place that protect the confidentiality of personal information and should provide a grievance procedure to address complaints. Nonprofits should regularly monitor the satisfaction of program participants.



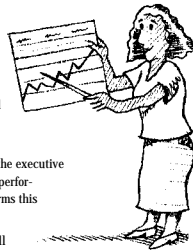
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## governing body

*Nonprofits are governed by an elected, volunteer board of directors that should consist of individuals who are committed to the mission of the organization. An effective nonprofit board should determine the mission of the organization, establish management policies and procedures, assure that adequate human resources (volunteer and/or paid staff) and financial resources (earned income, government contracts and grants, and charitable contributions) are available, and actively monitor the organization's management, financial and programmatic performance.*

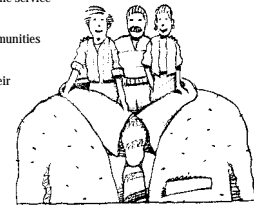
**A. Board Responsibilities**

- (1) The board should engage in long-term and short-term planning activities as necessary to determine the mission of the organization, to define specific goals and objectives related to the mission, and to evaluate the success of the organization's programs toward achieving the mission.
- (2) The board should establish policies for the effective management of the organization, including financial and, where applicable, personnel policies.
- (3) The board annually should approve the organization's budget and periodically should assess the organization's financial performance in relation to the budget. As part of the annual budget process, the board should review the percentages of the organization's resources spent on program, administration, and fundraising. The full board should also approve the findings of the organization's annual audit and management letter and plan to implement the recommendations of the management letter.
- (4) The full board or some designated committee of the board should hire the executive director, set the executive's compensation, and evaluate the director's performance at least annually. In cases where a designated committee performs this responsibility, details should be reported to the full board.
- (5) The board should periodically review the appropriateness of the overall compensation structure of the organization.



**B. Board Composition**

- (1) The board should be composed of individuals who are personally committed to the mission of the organization and possess the specific skills needed to accomplish the mission.
- (2) Where an employee of the organization is a voting member of the board, the circumstances must insure that the employee will not be in a position to exercise undue influence.
- (3) The board should have no fewer than five (5) unrelated directors. Seven (7) or more directors are preferable.
- (4) The organization's bylaws should set forth term limits for the service of board members.
- (5) Board membership should reflect the diversity of the communities served by the organization.
- (6) Board members should serve without compensation for their service as board members. Board members may only be reimbursed for expenses directly related to carrying out their board service.





#### C. Conduct of the Board

- (1) The board is responsible for its own operations, including the education, training and development of board members, periodic (i.e., at least every two years) evaluation of its own performance, and where appropriate, the selection of new board members.
- (2) The board should establish stated expectations for board members, including expectations for participation in fundraising activities, committee service, and program activities.
- (3) The board should meet as frequently as is needed to fully and adequately conduct the business of the organization. At a minimum, the board should meet four (4) times a year.
- (4) The organization should have written policies that address attendance and participation of board members at board meetings. These policies should include a process to address noncompliance.
- (5) Written meeting minutes reflecting the actions of the board, including reports of board committees when acting in the place of the board, should be maintained and distributed to board and committee members.



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## conflict of interest

*Nonprofit board and staff members should act in the best interest of the organization, rather than in furtherance of personal interests or the interests of third parties. A nonprofit should have policies in place, and should routinely and systematically implement those policies, to prevent actual, potential, or perceived conflicts of interest.*

**A. Conflict of Interest Policy**

(1) Nonprofits should have a written conflict of interest policy. The policy should be applicable to all board members and staff, and to volunteers who have significant independent decision making authority regarding the resources of the organization. The policy should identify the types of conduct or transactions that raise conflict of interest concerns, should set forth procedures for disclosure of actual or potential conflicts, and should provide for review of individual transactions by the uninvolved members of the board of directors.

**B. Conflict of Interest Statements**

(1) Nonprofits should provide board members, staff, and volunteers with a conflict of interest statement that summarizes the key elements of the organization's conflict of interest policy. The conflict of interest statement should provide space for the board member, employee or volunteer to disclose any known interest that the individual, or a member of the individual's immediate family, has in any business entity which transacts business with the organization. The statement should be provided to and signed by board members, staff, and volunteers both at the time of the individual's initial affiliation with the organization and at least annually thereafter.



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# human resources

*A nonprofit's relationship to its employees and volunteers is fundamental to its ability to achieve its mission. Volunteers occupy a special place in nonprofit organizations, serving in governance, administrative and programmatic capacities. An organization's human resource policies should address both paid employees and volunteers, and should be fair, establish clear expectations, and provide for meaningful and effective performance evaluation.*

**A. Personnel Policies**

- (1) A nonprofit should have written personnel policies and procedures, approved by the board of directors, governing the work and actions of all employees and volunteers of the organization. In addition to covering basic elements of the employment relationship (e.g. working conditions, employee benefits, vacation and sick leave), the policies should address employee evaluation, supervision, hiring and firing, grievance procedures, employee growth and development, confidentiality of employee, and client and organization records and information.
- (2) With respect to volunteers, the organization's policies and procedures should also address initial assessment or screening, assignment to and training for appropriate work responsibilities, ongoing supervision and evaluation, and opportunities for advancement.

**B. Employee Performance Evaluation**

- (1) A nonprofit should have written job descriptions for each employee that clearly identifies roles and responsibilities.
- (2) Organizations should have a system in place for regular written evaluation of employees by their respective supervisors, which should take place at least annually.

**C. Employee Orientation**

- (1) New employees of the organization should receive an orientation, which includes review of the organization's personnel policies and procedures, position description, and an introduction to the **Standards for Excellence**. Employees should be provided with a copy of the personnel policies and these **Standards**, and should acknowledge the receipt in writing.



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# financial and legal

*Nonprofits must practice sound financial management and comply with a diverse array of legal and regulatory requirements. A nonprofit's financial system should assure that accurate financial records are kept and that the organization's financial resources are used in furtherance of the organization's charitable purposes. Organizations should conduct periodic reviews to address regulatory and liability concerns.*



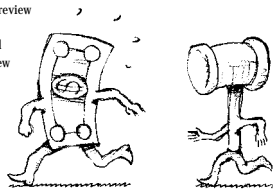
**A. Financial Accountability**

- (1) A nonprofit should operate in accordance with an annual budget that has been approved by the board of directors.
- (2) A nonprofit should create and maintain financial reports on a timely basis that accurately reflect the financial activity of the organization. Internal financial statements should be prepared no less frequently than quarterly, should be provided to the board of directors, and should identify and explain any material variation between actual and budgeted revenues and expenses.
- (3) For nonprofits with annual revenue in excess of \$300,000, the accuracy of the financial reports should be audited by a Certified Public Accountant.
- (4) Organizations should provide employees a confidential means to report suspected financial impropriety or misuse of organization resources and should have in place a policy prohibiting retaliation against persons reporting improprieties.
- (5) Organizations should have written financial policies adequate for the size and complexity of their organization governing: (a) investment of the assets of the organization (b) internal control procedures, (c) purchasing practices, and (d) unrestricted current net assets.



**B. Legal Compliance and Accountability**

- (1) Nonprofits must be aware of and comply with all applicable Federal, state, and local laws. This may include, but is not limited to, the following activities: complying with laws and regulations related to fundraising, licensing, financial accountability, document retention and destruction, human resources, lobbying and political advocacy, and taxation.
- (2) Organizations should periodically assess the need for insurance coverage in light of the nature and extent of the organization's activities and its financial capacity. A decision to forego general liability insurance coverage or Directors and Officers liability insurance coverage shall only be made by the board of directors and shall be reflected in the minutes for the meeting at which the decision was made.
- (3) Nonprofits should periodically conduct an internal review of the organization's compliance with existing legal, regulatory and financial reporting requirements and should provide a summary of the results of the review to members of the board of directors.



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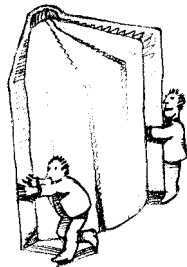
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**A. Annual Report**

- (1) Nonprofits should prepare, and make available annually to the public, information about the organization's mission, program activities, and basic audited (if applicable) financial data. The report should also identify the names of the organization's board of directors and management staff.

**B. Public Access**

- (1) Nonprofits should provide members of the public who express an interest in the affairs of the organization with a meaningful opportunity to communicate with an appropriate representative of the organization.
- (2) Nonprofits should have at least one staff member who is responsible to assure that the organization is complying with both the letter and the spirit of Federal and state laws that require disclosure of information to members of the public.



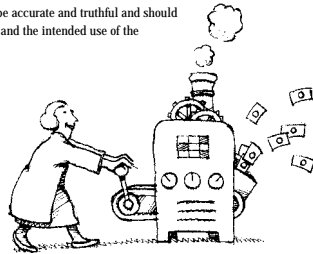
standards for excellence

fundraising

*Charitable fundraising provides an important source of financial support for the work of most nonprofit organizations. An organization's fundraising program should be maintained on a foundation of truthfulness and responsible stewardship. Its fundraising policies should be consistent with its mission, compatible with its organizational capacity, and respectful of the interests of donors and prospective donors.*

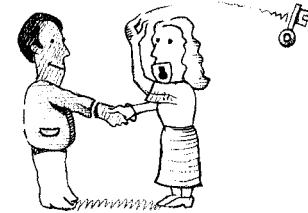
**A. Fundraising Activities**

- (1) A nonprofit's fundraising costs should be reasonable over time. On average, over a five (5) year period, a nonprofit should realize revenue from fundraising and other development activities that are at least three times the amount spent on conducting them. Organizations whose fundraising ratio is less than 3:1 should demonstrate that they are making steady progress toward achieving this goal, or should be able to justify why a 3:1 ratio is not appropriate for the individual organization.
- (2) Solicitation and promotional materials should be accurate and truthful and should correctly identify the organization, its mission, and the intended use of the solicited funds.
- (3) All statements made by the nonprofit in its fundraising appeals about the use of a contribution should be honored.
- (4) Nonprofits must honor the known intentions of a donor regarding the use of donated funds.



**B. Donor Relationships and Privacy**

- (1) Nonprofits should respect the privacy of donors and safeguard the confidentiality of information that a donor reasonably would expect to be private.
- (2) Nonprofits should provide donors an opportunity to state that they prefer to remain anonymous and that their name, the amount of their gift, or other information not be publicly released.
- (3) Nonprofits should provide donors an opportunity to have their names removed from any mailing lists which are sold, rented, or exchanged.
- (4) Nonprofits should honor requests by a donor to curtail repeated mailings or telephone solicitations from in-house lists.
- (5) Solicitations should be free from undue influence or excessive pressure, and should be respectful of the needs and interests of the donor or potential donor.



C. Acceptance of Gifts

(1) An organization should have policies in place to govern the acceptance and disposition of charitable gifts that are received in the course of its regular fundraising activities. These policies should include procedures to determine any limits on individuals or entities from which the organization will accept a gift, the purposes for which donations will be accepted, the type of property which will be accepted, and whether to accept an unusual or unanticipated gift in light of the organization's mission and organizational capacity.

D. Fundraisers

- (1) Fundraising personnel, including both employees and independent consultants, should not be compensated based on a percentage of the amount raised or other commission formula.
- (2) When using the services of a paid professional fundraising consultant, organizations should only use the services of professional solicitors and fundraising counsel who are properly registered with applicable regulatory authorities.
- (3) Organizations should exercise control over any staff, volunteers, consultants, contractors, other organizations, or businesses who are known to be soliciting contributions on behalf of the organization.



standards for excellence

public affairs and  
public policy

*Nonprofits provide an important vehicle through which individuals organize and work together to improve their communities. Nonprofits should represent the interests of the people they serve through public education and public policy advocacy, as well as by encouraging board members, staff, volunteers and constituents to participate in the public affairs of the community.*



**A. Public Policy Advocacy**

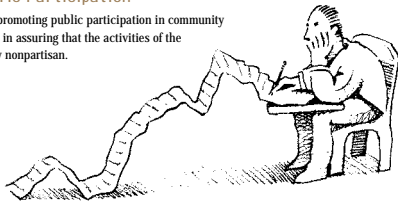
(1) Nonprofits should have a written policy on advocacy defining the process by which the organization determines positions on specific issues.

**B. Public Education**

(1) Nonprofits should assure that any educational information provided to the media or distributed to the public is factually accurate and provides sufficient contextual information to be understood.

**C. Promoting Public Participation**

(1) Nonprofits engaged in promoting public participation in community affairs shall be diligent in assuring that the activities of the organization are strictly nonpartisan.



## Receipt and Acknowledgment

I acknowledge that I have received a copy of Standards for Excellence: an Ethics and Accountability Code for the Nonprofit Sector.

Signature: \_\_\_\_\_

Print Name: \_\_\_\_\_

Nonprofit Organization: \_\_\_\_\_

Check one:     Board Member     Staff Member

Date: \_\_\_\_\_

*Note: This Acknowledgment Form is for the use of your organization. It is intended to be completed and then turned in to the appropriate Board or staff representatives, as designated by the leadership of your organization.*

About the Standards for Excellence Institute

The Standards for Excellence Institute is a new national initiative to promote the highest standards of ethics and accountability in nonprofit governance, management and operations, and to facilitate adherence to those standards by all nonprofit organizations. The Institute uses as a vehicle the Standards for Excellence program, a system of nonprofit sector industry self-regulation originated by the Maryland Association of Nonprofit Organizations and initially replicated by state nonprofit associations in Ohio, Pennsylvania, Georgia, Louisiana and North Carolina.

The centerpiece of the Institute's program is the *Standards for Excellence: An Ethics and Accountability Code for the Nonprofit Sector*. The Institute also makes available to member organizations a comprehensive system of educational tools to enable individual nonprofit organizations to improve their governance and management practices. Standards for Excellence certification is available to individual organizations through a rigorous peer review process in selected locations.

For information about joining the Standards for Excellence Institute or to obtain additional copies of the booklet visit our website at [www.standardsforexcellenceinstitute.org](http://www.standardsforexcellenceinstitute.org).

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ASSOCIATION OF CORPORATE COUNSEL

2005 ANNUAL MEETING

LEGAL UNDERDOG TO CORPORATE SUPERHERO –  
USING COMPLIANCE FOR A COMPETITIVE ADVANTAGE

REGULATION OF FUND RAISING



Standards for Excellence Institute

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October 18, 2005

Washington, D.C.

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**REGULATION OF FUND RAISING****I. OVERVIEW OF LAW OF FUND RAISING**

- A. This presentation concerns charitable, not political, fund raising.
- B. Federal – various statutes and agencies.
- C. State – principally, charitable solicitation acts.
- D. Local -- ordinances.
- E. Watchdog groups (standards, not law).

**II. STATE LAW**

- A. Charitable solicitation acts – contents:
  - 1. Definitions.
  - 2. Registration (preapproval).
  - 3. Reporting.
  - 4. Exemptions.
  - 5. Regulations of professional fund raisers.
  - 6. Regulation of professional solicitors.
  - 7. Regulation of commercial co-ventures.
  - 8. Availability of records.
  - 9. Contracts.
  - 10. Prohibited acts.
  - 11. Regulatory prohibitions.
  - 12. Disclosure statements and legends.
  - 13. Regulatory agency, investigations.

- 14. Sanctions – injunctions, civil and criminal penalties.

**B. Legal issues:**

- 1. Police power of states (*Thomas v. Collins*, 323 U.S. 516 (1945)).
- 2. Constitutionality – First Amendment considerations (*Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980)); *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947 (1984)); *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988)).
- 3. Due process rights (*Freeman v. Maryland*, 380 U.S. 511).
- 4. Equal protection rights (*Auburn Police Union v. Tierney*, 756 F. Supp. 610 (D. Me. 1991), 762 F. Supp. 3 (D. Me. 1991)).
- 5. Commerce clause (*Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 520 U.S. 564 (1997)).
- 6. Delegation of legislative authority (*Gospel Missions of America v. Bennett*, 951 F. Supp. 1429 (C. D. Fla. 1997)).
- 7. Definitions of *professional fund raiser* and *professional solicitor*.
- 8. Application of charitable solicitation acts in nongift situations.
- 9. Unified registration.
- 10. Door-to-door advocacy (*Watchtower Bible and Tract Society of New York v. Village of Stratton*, 536 U.S. 150 (2002)).
- 11. Fraud (*Illinois v. Telemarketing Associates, Inc.* (538 U.S. 600 (2003)).
- 12. Exemptions, such as for religious organizations (*Heritage Village Church and Missionary Fellowship, Inc. v. North Carolina*, 40 N.C. App. 429 (1979), *aff'd*, 263 S.E.2d 726 (1980)), colleges and universities, membership groups (*Blenski v. State*, 245 N.W.2d 906 (Wis. 1976)).
- 13. Internet fund raising (*United States v. Thomas*, 74 F.3d 701 (6<sup>th</sup> Cir. 1996)) – Charleston Principles.

## C. Other laws:

1. Gambling/gaming.
2. Insurance (concerning annuities).

**III. FEDERAL LAW**

## A. Absence of federal fund raising statute:

1. Failed attempts at legislation.
2. Preemption of state law (cf. Electronic Signature Act).

## B. Federal tax law regulation (other than charitable giving law):

1. Unrelated business rules (IRC §§ 511-514):
  - a. Definition of *business* (IRC § 513(c)).
  - b. *Regularly carried on* test (Reg. § 1.513-1(c)):
    - i. General application (IRS private letter ruling 200128059).
    - ii. Matter of preparatory time.
  - c. Relatedness standard (Reg. § 1.513-1(d)).
  - d. Exceptions:
    - i. Businesses conducted by volunteers (IRC § 513(a)(1)).
    - ii. Sales of gift items (IRC § 513a(3)):
      - (a) Thrift stores.
      - (b) Vehicle donations.
    - iii. Royalties (IRC § 512(b)(2)).
    - iv. Other forms of passive income.
2. Corporate sponsorships:
  - a. Safe harbor rule (IRC § 513(i)).

## b. Other tax treatment.

## c. Matter of links.

## 3. Intermediate sanctions (IRC § 4958):

- a. Excess benefit transactions in general.
- b. Excessive compensation (IRS private letter ruling 200243057).
- c. Revenue-sharing transactions.
- d. Fund raisers as disqualified persons.

## 4. Exemption recognition application process (Form 1023).

## 5. Annual information return (Form 990).

## 6. Public charity classifications (IRC § 509(a)):

- a. Various classifications.
- b. Facts-and-circumstances test (Reg. § 1.170A-9(e)(3)).

## 7. IRS college and university examination guidelines.

## 8. IRS Implementing Guidelines.

## 9. Disclosure by noncharitable organizations (IRC § 6113).

## 10. Use of supporting organizations (IRC § 509(a)(3)).

## 11. Use of donor-advised funds.

## C. Charitable giving law:

## 1. Charitable deduction rules (e.g., IRC § 170):

- a. Determining what is a *contribution*.
- b. Percentage limitations (IRC § 170(b)).
- c. Deduction reduction rules (IRC § 170(e)).
- d. Appraisal requirements (Reg. § 1.170A-13(c)).

- e. Reporting rules (IRC § 6050L).
  - f. Ban on charitable split-dollar life insurance plans (IRC § 170(f)(10)).
2. Fund raising disclosure by charitable organizations.
  3. Charitable gift substantiation requirements (IRC § 170(f)(8)) (*Addis v. Commissioner*, 118 T.C. 528 (2002), *aff'd*, 374 F.3d 881 (9<sup>th</sup> Cir. 2004)).
  4. Quid pro quo contribution rules (IRC § 6115).
  5. Planned giving vehicles:
    - a. Charitable remainder trusts (IRC § 664).
    - b. Pooled income funds (IRC § 642(c)(5)).
    - c. Charitable gift annuities (IRC § 514(c)(5)).
    - d. Other approaches.
  6. Recently enacted rules:
    - a. Vehicle contributions (IRC § 170(f)(12)).
    - b. Intellectual property contributions (IRC §§ 170(e)(1)(B)(iii), 170(m)).
    - c. Expanded reporting requirements (IRC §§ 170(f)(11)(D), 6050L(a)(2)).
- D. Other forms of federal regulation:
1. Postal laws.
  2. Antitrust laws.
  3. Securities laws.
  4. Federal Trade Commission telemarketing rules.

#### IV. LOCAL LAW

- A. Fund raising regulation ordinances.

- B. Jurisdictional reach of these ordinances (*American Charities for Reasonable Fundraising Regulation, Inc. et al. v. Pinellas County*, 189 F. Supp. 2d 1319 (M.D. Fla. 2001), on remand, 221 F.3d 1211 (11<sup>th</sup> Cir. 2000)).
- C. Gambling/gaming rules.

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**LEGAL ASPECTS OF CAUSE MARKETING**

**Nicole R. Pierce**  
American Cancer Society, Inc.  
Atlanta, Georgia

Association of Corporate Counsel  
2005 Annual Meeting  
October 17-19

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### WHAT IS CAUSE MARKETING?

Cause marketing, also known as “commercial co-ventures” or “third party charitable sales promotions,” takes place when a for-profit entity represents to the public that the purchase of its goods or services will benefit a charity. In turn, the for-profit entity’s commercial sales and corporate image improve and the charity’s funding increases. Generally, the charity’s name or logo is used by the for-profit entity in return for a flat fee or for a percentage of the proceeds from the sale.

Cause marketing can produce profound results. In 1983, American Express pledged to contribute a penny to the restoration of the Statue of Liberty for every transaction made by its cardholders. During this period, use of American Express cards increased by 28% and new users increased by 17%.<sup>1</sup> This is one of the first known examples of cause marketing.<sup>2</sup> Other examples include Lady Footlocker’s \$5.00 contribution to the American Cancer Society for each limited edition breast cancer t-shirt sold during a month long promotion; Coca-Cola’s 15 cent donation to Mothers Against Drunk Driving for every case of Coca-Cola bought during a 6-week promotion; and TUMS’ 10 cent contribution to the First Responder Institute for every bottle of TUMS sold.

### ADVANTAGES AND DISADVANTAGES FOR CHARITIES

Cause marketing can be very beneficial to charities. It diversifies their funding sources, develops alliances that enable the charities to more easily accomplish their missions, and makes their missions more visible. Charities are also able to gain access to new audiences, make connections to the for-profit entities’ networks of employees, suppliers and distributors, and obtain expertise in marketing and strategic development.<sup>3</sup> In so doing, however, charities should be careful not to damage their reputations by aligning themselves with for-profit entities that do not espouse the charities’ missions. They should also be aware of brand dilution caused by over commercialization of their names or logos or diminished donor affinity and support if the donors’ trust is violated or privacy is not upheld. Charities may also have to pay Unrelated Business Income Tax<sup>4</sup> (“UBIT”), of up to 50%, on the income generated from the cause marketing campaigns if the promotions are not structured correctly. Finally, they may also be subject to fines, penalties or the revocation of their licenses to solicit funds if laws or regulations are violated.

### ADVANTAGES AND DISADVANTAGES FOR FOR-PROFIT ENTITIES

For-profit entities are also able to benefit from cause marketing efforts. A 2004 survey found that 8 out of 10 Americans say that corporate support of a cause wins their trust in a company, and 86% of individuals polled were likely to switch from one brand to another of similar quality and price if it were associated with a cause.<sup>5</sup> For-profit entities that support a cause appeal to buyers’ values and emotions. Such support provides brand differentiation, enhances employee recruitment and retention, and builds

new and deeper community networks. It also can enhance a for-profit entity’s credibility. However, for-profit entities must be aware that cause marketing is a state regulated activity, and depending on where the promotion is conducted, they may be required to make certain filings or post bonds. For-profit entities will also be subject to state and federal consumer protection laws and regulations and risk potential fines and penalties for non-compliance.

### STATE LAWS REGULATING CAUSE MARKETING

#### COMPLIANCE FOR CHARITIES

Most states require that charities register with the state and deliver financial reports annually if they will be raising any funds within the state. With regard to cause marketing, charities need to be aware of their individual state regulations to ensure compliance. Some states<sup>6</sup> require a written contract between the parties to be filed with the state. This is most often filed by the for-profit entity, although states such as Connecticut<sup>7</sup> and New Jersey<sup>8</sup> require the charity to file the contract. The states of Georgia,<sup>9</sup> New Hampshire<sup>10</sup> and Utah<sup>11</sup> only require that a written contract be made prior to commencement of the charitable sales promotion and made available to a state official upon request. Many states,<sup>12</sup> however, do not require a contract to be made at all. See Appendix A for a summary of state commercial co-venture requirements.

#### COMPLIANCE FOR FOR-PROFIT ENTITIES

For-profit entities are often surprised to learn that they too are required to comply with certain regulations in order to take part in commercial co-ventures. Many states have charitable solicitation statutes in order to decrease the fraudulent practice of a company soliciting funds for a charitable purpose without delivering the funds to the named charity. The states of Alabama,<sup>13</sup> Maine,<sup>14</sup> Massachusetts<sup>15</sup> and Washington<sup>16</sup> require for-profit entities to register or to be licensed as “commercial co-venturers” or “professional fund-raisers” and to post bonds to ensure that the charities receive the contributions pledged to them. Other state requirements include that disclosures be made in advertising the charitable sales promotions; that charities consent in writing to the use of their names or logos in the advertisement of the sales promotions; that for-profit entities provide interim and/or final accountings to the charities and/or to the states; that for-profit entities retain books and records pertinent to their

<sup>6</sup> Alabama (Ala. Code § 13A-9-71(i)), Arizona (Ariz. Rev. Stat. § 44-6554(E-F)), Connecticut (Conn. Gen. Stat. § 21a-190f(d)), Maine (9 Me. Rev. Stat. Ann. §385-5009), Massachusetts (Mass. Gen. Laws ch. 68 § 22), New Jersey (N.J. Stat. Ann. § 45:17A-29.), New York (N.Y. Exec. Law 7-A § 173-a), and Washington (Wash. Rev. Code § 19.09.065.)

<sup>7</sup> Conn. Gen. Stat. § 21a-190e.

<sup>8</sup> N.J. Stat. Ann. § 45:17A-29.

<sup>9</sup> OCGA § 43-17-6.

<sup>10</sup> N.H. Rev. State. Ann. § 7:28-d.

<sup>11</sup> Utah Code Ann. § 13-22-22.

<sup>12</sup> California, Colorado, Florida, Hawaii, Louisiana, North Carolina, Ohio, Oregon, Pennsylvania, and Wisconsin

<sup>13</sup> Ala. Code § 13A-9-71(h).

<sup>14</sup> 9 Me. Rev. Stat. Ann. § 5008.

<sup>15</sup> Mass. Gen. Laws ch. 68, § 24.

<sup>16</sup> Wash. Rev. Code § 19.09.065, 190.

<sup>1</sup> Cause Marketing Forum <<http://www.causemarketingforum.com/page.asp?ID=345>> (accessed June 1, 2005).

<sup>2</sup> Office of the Attorney General, State of California, *What's In a Nonprofit's Name?*

<<http://caag.state.ca.us/publications/nonprofit/>> (accessed July 14, 2005).

<sup>3</sup> Cause Marketing Forum <<http://www.causemarketingforum.com/page.asp?ID=82>>.

<sup>4</sup> IRC § 512.

<sup>5</sup> Cause Marketing Forum <<http://www.causemarketingforum.com/page.asp?ID=330>>.



activities, collections and contributions for some period of time; and that for-profit entities file reports with the states.<sup>17</sup>

### **CONSUMER PROTECTION LAWS**

Consumer protection laws have been created at the state and federal level to prohibit false advertising, consumer fraud and deceptive trade practices. These consumer protection laws prohibit representations which are false or have the ability to mislead or deceive. They cover both affirmative misrepresentations about goods and services and the failure to disclose important facts to the public. The Federal Trade Commission Act<sup>18</sup> was passed by Congress to prevent unfair methods of competition and unfair or deceptive practices affecting commerce. When charities and for-profit entities take part in cause marketing they must abide by these consumer protection laws.

### **ATTORNEYS GENERAL'S GUIDANCE**

In 1999, Attorneys General from 16 states issued a report<sup>19</sup> with suggested solutions to assist charities and for-profit entities in complying with both state and federal laws and regulations. The report is meant to further public understanding, provide guidance to charities, commercial sponsors and the public, and help define deceptive and misleading promotions. Charities and for-profit entities are well served to comply with the guidance and should encourage their collaborators to follow suit in order to preserve the credibility of their relationship and their respective names. The suggested guidance reads as follows:

1. Both the commercial sponsor and the nonprofit organization engaged in advertising a commercial product through use of the nonprofit's name or logo must satisfy all applicable legal standards, including compliance with consumer laws prohibiting false advertising, unfair and/or deceptive trade practices and consumer fraud.
2. Advertisements for commercial products must not misrepresent that the nonprofit organization has endorsed the advertised product. If such an advertisement uses a nonprofit organization's name or logo, and the nonprofit has not in fact endorsed the advertised product, the advertisement must clearly and conspicuously disclose that the nonprofit organization has not endorsed or recommended the product.
3. Advertisements for commercial products using the name or logo of a nonprofit organization must avoid making express or implied claims that the advertised product is superior to others in the same product category, unless the claim is true and substantiated, and the nonprofit has determined the advertised product to be superior to others in the same product category. If the nonprofit has not determined the advertised product to be superior, the advertisement must clearly and conspicuously disclose that fact.

4. Advertisements for commercial products using the name or logo of a nonprofit must disclose clearly and conspicuously that the corporate sponsor has paid for the use of the nonprofit's name or logo.
5. Product advertisements arising from a commercial-nonprofit relationship shall not mislead, deceive or confuse the public about the effect of the consumer's purchase on charitable contributions by the commercial sponsor.
6. Advertising partnerships between commercial and nonprofit entities should avoid exclusive product sponsorships. However, in the case where an exclusive relationship exists, product advertisements using the name or logo of a nonprofit should clearly and conspicuously disclose that fact.

The Attorneys General believe that adherence to these principles is in the public interest and will assist both the commercial and the nonprofit entities engaged in product advertising in meeting their legal obligations. Implementing truth-in-advertising principles will benefit both partners alike, particularly as they seek to maintain the high levels of public trust and admiration that nonprofit organizations have long enjoyed as a result of their valuable contributions to the health and welfare of our society.<sup>20</sup>

### **WHY COMPLY? REAL CONSEQUENCES CAN RESULT FROM VIOLATIONS**

Failure to comply with applicable laws and regulations can have serious consequences for the charity and the for-profit entity. It may prompt investigations by law enforcement agencies, including state Attorneys General and the Federal Trade Commission ("FTC"), as well as private litigation. The following details some instances of violations, offering insight into some of the hazards that should be avoided:

- In 1994, McNeil Consumer Products Company paid the Arthritis Foundation \$1 million annually, plus a percentage of royalties, to use the Arthritis Foundation's name and logo in marketing four over-the-counter pain-relief products. The advertisements falsely represented that the Arthritis Foundation "helped to create" the products and that a portion of each purchase price would be used to find a cure for arthritis. In fact, the Arthritis Foundation did not create the products and received a guaranteed \$1 million, regardless of consumer sales. Additionally, certain ads represented that the products were "doctor recommended" when only the ingredients themselves, which were identical to those in other over-the-counter products, were actually recommended by doctors. The settlement granted refunds to consumers upon request and required McNeil to pay \$1,960,000 for costs, attorneys' fees and other independent arthritis research.<sup>21</sup>
- Settled in 1995, the Eskimo Pie Corporation case involved the use of a triangular logo on various frozen dessert packages with the statement "Now Eskimo Pie and the American Diabetes Association are partners in providing the pure pleasure of frozen novelties to everyone!" The Association had not endorsed the advertised products, and the desserts contained high levels of both total and saturated fat.<sup>22</sup>

<sup>17</sup> Mary Hutchings Reed, *Legal Guide to Cause Marketing*, 156-57 (IEG 2001).

<sup>18</sup> 15 U.S.C. §§ 41-58.

<sup>19</sup> Office of the Attorney General, State of California, *What's In a Nonprofit's Name?* <<http://caag.state.ca.us/publications/nonprofit/>>.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Federal Trade Commission <<http://www.ftc.gov/opa/1995/05/epcorp.htm>> (accessed July 15, 2005).

- In 1996, SmithKline Beecham paid the American Cancer Society (“ACS”) \$1 million a year plus certain royalties for the right to use the ACS name in connection with its marketing of the NicoDerm patch and Nicorette gun. The ads featured the ACS logo and the slogan “Partners in Helping Quit.” This suggested that ACS had endorsed the products as being more effective than others in helping smokers to quit smoking. In fact, ACS had not endorsed the product as a more effective means to quit smoking. In a settlement with 12 states, SmithKline agreed to pay \$2.5 million for costs, fees and donations to smoking cessation initiatives.<sup>23</sup>

While the charities involved may not traditionally suffer monetary penalties that are as severe as those of the for-profit entities involved, charities still may risk fines and penalties, or in instances of egregious activity, revocation of their licenses to solicit funds in a given state. Additionally, charities can suffer damage to their credibility, which in turn may decrease the amount of donations, dilute the value of their trademarks, and increase regulatory scrutiny.

#### **BETTER BUSINESS BUREAU STANDARD FOR CHARITABLE ACCOUNTABILITY/GOVERNANCE AND OVERSIGHT**

The Better Business Bureau (“BBB”) is a private, nonprofit organization whose mission is to promote and foster ethical relationships between businesses and the public through voluntary self-regulation, consumer and business education and service excellence. It has specific guidelines for contractual and promotional disclosures for cause marketing relationships. The standard that relates to cause marketing is the following:

##### **Standard 19<sup>24</sup>**

Clearly disclose how the charity benefits from the sale of products or services that state or imply that a charity will benefit from a consumer sale or transaction. Such promotions should disclose, at the point of solicitation:

- the actual or anticipated portion of the purchase price that will benefit the charity (e.g., 5 cents will be contributed to abc charity for every xyz company product sold),
- the duration of the campaign (e.g., the month of October),
- any maximum or guaranteed minimum contribution amount (e.g., up to a maximum of \$200,000).

Compliance with the BBB standard is not mandatory; however, there can be negative ramifications for the failure of a charity to follow the standards. For example, the BBB may post on its Web site that a charity “Does Not Meet” the BBB standards for charities as they relate to cause marketing activities. Additionally, failure to comply with the cause marketing standard may jeopardize a charity’s use of the BBB national charity seal. In 2003, the BBB Wise Giving Alliance (a merger of the National Charities Information Bureau and the Council of Better Business Bureaus’ Foundation and its Philanthropic Advisory Service) began offering national charities that adhere to specific standards the opportunity to apply for a BBB national charity seal. The seal can be displayed online and in solicitation materials and provides the public with a recognizable symbol that the charity adheres to the Alliance’s standards.

#### **INTERNAL CONTROLS**

Many charities are approached constantly by for-profit entities with cause marketing opportunities. To effectively and consistently deal with such opportunities, charities can establish internal controls for entering into cause marketing relationships. Such internal controls can provide guidance in keeping with the charity’s mission and compliance with applicable laws and regulations. Additionally, internal standards can add consistency to a charity’s cause marketing approach and give donors, watchdog groups and regulators confidence that any affiliation with a for-profit entity has been consistently evaluated by management. Set forth on [Appendix B](#) is an example of internal standards that may be adopted by the board of directors of a charity.

#### **TAX LAW CONSIDERATIONS**

While an in depth examination of tax issues related to cause marketing activities is beyond the scope of these materials, a discussion of taxes on the income received by the charity is an important part of the evaluation of any cause marketing promotion and must be seriously considered. A cause marketing promotion may cause a charity to be subject to a substantial tax on the proceeds of such promotion if the promotion is not structured in a way to eliminate or reduce additional tax. Charities may desire to take steps to eliminate or reduce Unrelated Business Income Tax<sup>25</sup> (“UBIT”), which is a tax imposed on the unrelated income generated by tax-exempt organizations. Unrelated income is generated by the organization from activities that are not related to its exempt mission. Income is considered to be unrelated if the activity is 1) conducted as a trade or business; 2) regularly carried out; and 3) not substantially related to the performance of the organization’s mission. If the charity does not actually promote the products or services and its fees are structured as royalty payments for the use of the organization’s name or logo, it can preclude payment of UBIT.<sup>26</sup> Although the charity should take a passive role in marketing the commercial product or service, it should nonetheless reserve and exercise its right to review and edit all materials, ensuring compliance with consumer protection laws. It is important to keep in mind that in addition to being taxed on income unrelated to its exempt mission, a charity can lose its tax-exempt status if more than an insubstantial part of its activities are unrelated to its mission.<sup>27</sup>

#### **DRAFTING CAUSE MARKETING CONTRACTS**

Any decision to go forward with a cause marketing promotion should include a detailed written agreement which sets forth the specific rights and obligations of the parties. It is important to note that, as previously discussed, many states require that such promotions are set forth in writing and filed with the state. An example of a cause marketing agreement used by a charity is set forth on [Appendix C](#) hereto. Regulations vary widely from state to state, so it is important to know where the cause marketing promotion will take place and to consult the applicable laws. Note that many promotions are placed on the Internet, and therefore, it can be argued that the promotion is conducted in every state. The following is a list of issues to consider when drafting cause marketing agreements:

<sup>23</sup> Office of the Attorney General, State of California <[http://caag.state.ca.us/publications/nonprofit/-full\\_text.html](http://caag.state.ca.us/publications/nonprofit/-full_text.html)> (accessed July 14, 2005).

<sup>24</sup> Better Business Bureau <<http://www.give.org/standards/newcbbstds.asp>> (accessed July 14, 2005).

<sup>25</sup> IRC § 512.

<sup>26</sup> IRS Publication 598 <<http://www.irs.gov/publications/p598/index.html>> (revised March 2005).

<sup>27</sup> *Church of Spiritual Technology v. U.S.*, 26 Cl.Ct. 713, 730 (1992).

- **Description of the Promotion.** The agreement should set forth the precise terms of the promotion, including what the for-profit entity will be selling and the actual dollar amount or percentage per unit the charity will receive upon each sale. A detailed description of the promotion is not only prudent but is required by law in many states.
- **Time Period of the Promotion.** The agreement should set forth the time frame of the promotion. Timing of a promotion can affect other aspects of the promotion. For example, some states require that the cause marketing agreement is filed *prior to* the commencement of a promotion, and that financial reports should be available within a certain time period after the promotion is concluded.
- **Territory.** The agreement should state the territory in which the promotion will take place, as this will dictate which state or international laws will be applicable to the promotion.
- **Proceeds to the Charity.** The parties should decide how to categorize the proceeds that the charity will receive from the promotion. If the income generated is in the form of a royalty fee in exchange for the use of the charity's trademarks, and the charity does not actively promote the campaign, then such income will not be categorized by the Internal Revenue Service as income that is subject to UBIT.<sup>28</sup> If the charity actively promotes a product or service associated with the promotion, all proceeds from the promotion, whether in the form of a royalty or otherwise, will be subject to UBIT.<sup>29</sup> Generally, it is inappropriate to use the word "donation" to categorize the proceeds to the charity, as the for-profit entity is generally contractually obligated to pay the charity a fee (fixed or a percentage or otherwise) for the use of its trademarks in connection with the promotion. In any case, due to the complex differences in the tax laws which apply to a 501(c)(3) charity versus those which apply to a for-profit entity, the parties should seek tax counsel with respect to the categorization of the proceeds generated from a cause marketing promotion in order to protect the contribution to the charity from taxes which may be eliminated.
- **Disclosure Requirements.** The agreement should state that the for-profit entity will disclose in all advertisements for the promotion the exact dollar amount or percent per unit of goods or services purchased or used that will benefit the charity. This disclosure is required by many states and is recommended by the BBB. A specific list of disclosures required by applicable state laws and the BBB set forth in the agreement can be a helpful tool to enforce compliance. Additionally, the parties may want to clearly state that the charity does not endorse any of the for-profit entity's products, services, political candidates or political causes and that the for-profit entity will not use the charity's trademarks in any way that would imply that the charity endorses its products, services, political candidates or political causes.
- **Prior Approval Rights.** Charities should seek to include the right to approve all promotional materials, in all forms, in writing prior to distribution to the public. Such approval rights are necessary to protect against the improper use of the charity's trademarks and to ensure compliance with state disclosure requirements and its own internal standards. Because there may be a substantial amount of materials that will be subject to review, it is advised that the parties establish fixed timelines for the review of materials and a specific contact person who has authority to approve such materials.
- **Books, Records and Reports.** Typically cause marketing promotions are conducted by the for-profit entity with little day-to-day involvement by the charity, except for approval rights on materials distributed to the public. This makes it especially important for the parties to establish how the for-profit entity will communicate the results of the promotion to the charity. The charity will need detailed information about the promotion for its filings with state regulators. The charity may want to require the for-profit entity to allow an audit of the books and records related to the promotion, and may want to require that the for-profit entity deliver financial reports which contain all information needed to be submitted by the charity to regulators. Additionally, the agreement should set forth a fixed schedule for delivery of such financial reports that meets the charity's internal needs and includes compliance with applicable regulations that require the delivery of such reports. For example, many states require that the for-profit entity make available financial reports to the charity and the state regulators within a certain period of time, which can be as little as 10 days after a final accounting has been completed. Additionally, the agreement should require the for-profit entity to maintain records related to the cause marketing promotion for at least three years, which is required by many states.
- **Intellectual Property.** The parties should clearly establish who owns the trademarks and related intellectual property used in connection with the promotion. Many times new trademarks are created in connection with a promotion and ownership decisions must be made. If the for-profit entity will use the charity's marks in connection with the promotion, the charity may want to grant a limited, nonexclusive, nontransferable, nonassignable revocable right to use its trademarks for the limited purposes set forth in the agreement. Additionally, such use of any trademarks should be subject to approval rights, as discussed above.
- **Termination.** The agreement should set forth specific termination provisions, as the parties may want to sever the relationship due to a wide range of issues. Charities may desire to have an unconditional termination provision, which would allow them to unilaterally terminate the agreement if they established, in their own discretion, that the cause marketing relationship was more detrimental to their mission than advantageous. The parties also may want to address what happens to branded merchandise after the termination of the agreement. For example, the charity may want to have any remaining branded merchandise pulled from shelves and have any promotional advertisements discontinued immediately. Alternatively, the parties may agree that the for-profit entity can sell remaining inventory after the termination for a limited time period, assuming that the same proceeds would be paid to the charity upon each sale and the same disclosure requirements apply. Additionally, note that if the promotion is being conducted in the state of New York, specific termination provisions are required to be set forth in the agreement.
- **Indemnification.** Indemnification provisions are usually highly negotiated and cause marketing agreements are no exception. Charities may be particularly concerned about risks associated with merchandise produced by the for-profit entity for which they have no control over and which will be associated with their name or inappropriate association of their trademark with a promotional message or claim. Consequently, indemnification for claims related to injuries caused by such merchandise or inappropriate use of the charity's trademark may be sought. For-profit entities may be concerned about third party claims related to their use of the charity's trademarks in their promotion, and may seek indemnification for such types of claims.

<sup>28</sup> IRS Publication 598 <<http://www.irs.gov/publications/p598/index.html>> (revised March 2005).

<sup>29</sup> *Id.*

- Mission Related Provisions. Charities may have internal controls which restrict their activities related to cause marketing promotions, and it is often beneficial to include these restrictions in the written agreement between the parties. The charity may desire to include in the agreement that the breach of any such mission related restrictions triggers termination of the agreement.

### PROMOTIONAL MATERIALS

It is important that the designers of the promotional materials for a cause marketing promotion and the legal and business teams are in close contact during the creation of the promotional materials. All parties involved in a cause marketing promotion must apply the terms of their cause marketing agreements to the materials that are ultimately distributed to the public. The parties should take advantage of any review periods that are established in the agreement to make sure that trademarks are properly used and that the promotional materials comply with state and federal consumer protection laws, state disclosure regulations and the BBB Wise Giving Alliance Standards. Attached as Appendix D is an example of a promotional materials checklist.

### Appendix A

#### SUMMARY OF STATE COMMERCIAL CO-VENTURE REQUIREMENTS

Updated on July 13, 2005

The following is a summary of state commercial co-venture requirements. Please see the actual text of each statute for greater detail.

#### **Alabama: Ala. Code §§ 13A-9-70 et seq.**

- a. A commercial co-venturer must register with the Attorney General annually and registration must be renewed by September 30th. Registration includes a \$100 filing fee and a \$10,000 bond.
- b. Contract is required to be submitted by for-profit entity within ten days after execution and at least fifteen days prior to the commencement of services to be performed.
- c. The charitable organization must file an annual financial report within ninety days of the close of its fiscal year.

#### **Arkansas: Ark. Code Ann. § 4-28-408**

- a. A charitable organization is required to be registered and a commercial co-venturer must have a written contract on file with the Attorney General prior to any charitable sales promotion.
- b. The contract shall include:
  - i. The goods or services to be offered;
  - ii. The geographic area, and the starting and ending date of the offering;
  - iii. How the non-profit organization's name will be used, including amount/percentage of the sale of goods or services to benefit the non-profit organization;
  - iv. Provide for an accounting per unit to be given to the non-profit organization and when the accounting will be given; and
  - v. When and how the benefit will be conferred on the non-profit organization.
- c. Commercial co-venturer shall disclose in each advertisement for the charitable sales promotion the amount per unit (in dollars or percentage of value) to benefit the non-profit organization.
- d. Commercial co-venturer shall keep the final accounting for each charitable sales promotion for 3 years after the accounting date, and the accounting shall be available to the Attorney General upon reasonable request.

**California: Cal. Gov't. Code §§ 12599.2- 12599.5**

A commercial co-venturer has two options:

- a. A commercial co-venturer is not required to register or file periodic reports with the Attorney General if it does the following:
  - i. A non-profit organization that is required to be registered and the commercial co-venturer must have a written contract signed by two officers of the charitable organization.
  - ii. Commercial co-venturers must transfer to the charitable organization all funds, assets or property received as a result of the sales promotion within 90 days after commencement of the campaign and at the end of each successive 90-day period during the campaign.
  - iii. In connection with each payment or transfer set required in paragraph ii, the commercial co-venturer must also provide a written accounting to the charity of all funds received sufficient to enable the charity to determine that representations made to the public on its behalf have been adhered to accurately and completely, and to prepare its periodic report filed with the Attorney General pursuant to Section 12586 of the Act.
- b. A commercial co-venturer that does not meet the requirements above must register and report to the Attorney General. There is an annual registration and renewal fee of \$200. Each application for registration or renewal shall be accompanied by a cash deposit or bond in the amount of \$25,000.

**Colorado: Colo. Rev. Stat. §§ 6-16-104- 6-16-110**

Commercial co-venturers shall file with the secretary of state a completed solicitation notice and a financial report for the campaign, and shall pay a filing fee.

The provisions relating to commercial co-venturers only apply when the commercial co-venturer reasonably expects that more than one-half of all proceeds from the solicitation campaign will be derived from transactions within the State of Colorado.

- a. Each charitable sales promotion advertisement must disclose the dollar amount or percent per unit of goods or services purchased or used that will benefit the non-profit.
- b. A commercial entity purchasing a wholesale product created, manufactured, and produced by a non-profit for resale to the general public as part of the general stock of merchandise of the commercial entity is exempt from these provisions.

**Connecticut: Conn. Gen. Stat. § 21a-190g**

- a. The non-profit organization who agrees to a charitable sales promotion to be conducted on its behalf shall obtain a written agreement from the commercial co-venturer and file the agreement not less than ten days prior to the charitable sales promotion.
- b. The agreement shall be signed by a representative of the commercial co-venturer and the non-profit organization and shall include the following terms:
  - i. The goods or services to be offered to the general public;
  - ii. The geographic area and the beginning and ending dates when such offering is to be made;
  - iii. The manner in which the name of the non-profit organization is to be used, including any representation to be made to the general public as to the amount or percent per unit of goods or services purchased or used that is to benefit the non-profit organization;
  - iv. A provision for a final accounting on a per unit basis to be given by the commercial co-venturer to the non-profit organization and the date when it is to be made; and
  - v. The date when and the manner in which the benefit will be conferred on the non-profit organization.
- c. The commercial co-venturer shall keep a final accounting for each charitable sales promotion for a period of three years and make the final accounting available to the state upon request.
- d. The commercial co-venturer shall disclose in each advertisement for a charitable sales promotion the amount per unit of goods or services purchased that is to benefit the non-profit organization or charitable purpose. Such amount may be expressed as a dollar amount or as a percentage of the value of the goods or services purchased.

**Florida: Fla. Stat. Ann. § 496.414**

- a. Prior to commencement of a charitable sales promotion on behalf of a non-profit organization, a commercial co-venturer shall obtain the written consent of the non-profit whose name will be used during the charitable sales promotion;
- b. If determined to be essential to protect the general public from deceptive or fraudulent advertising, the department may adopt rules requiring disclosure in advertising for a charitable sales promotion relating to the amount that will benefit the non-profit organization.
- c. A final accounting for each charitable sales promotion must be prepared by the commercial co-venturer following the completion of the charitable sales promotion and kept for a period of three years. The final accounting must be provided to the non-profit organization not less than ten days after its request. A copy of the final

accounting must be provided to the state not less than ten business days after its request.

Note that Pinellas County no longer requires commercial co-venturers to register separately with the county.

**Georgia: O.C.G.A. § 43-17-6**

- a. Prior to the commencement of a charitable sales promotion, a non-profit organization which agrees to permit a charitable sales promotion to be conducted on its behalf shall obtain a written agreement from the commercial co-venturer which shall be available to the Secretary of State upon request. The agreement shall include:
  - i. The goods or services to be offered to the public;
  - ii. The geographic area where, and the starting and final date when, the offering will be made;
  - iii. The manner in which the non-profit organization's name will be used, including the representation to be made to the public as to the actual or estimated dollar amount or percent per unit of goods or services purchased or used that will benefit the non-profit organization;
  - iv. If applicable, the maximum dollar amount that will benefit the non-profit organization;
  - v. The estimated number of units or goods or services to be sold or used;
  - vi. A provision for a final accounting on a per unit basis to be given by the commercial co-venturer to the non-profit organization and the date by which it will be made;
  - vii. A statement that the charitable sales promotion is subject to the requirements of this chapter; and
  - viii. The date by when, and the manner in which, the benefit will be conferred on the non-profit organization.
- b. The final accounting of a charitable sales promotion shall be kept by the commercial co-venturer for three years.
- c. All records pertaining to a charitable sales promotion are subject to reasonable periodic, special, or other examinations by representatives of the Secretary of State whenever deemed necessary.

**Hawaii: Haw. Rev. Stat. Ann. § 467B-5.5**

- a. All charitable sales promotions by a commercial co-venturer shall disclose the name of the commercial co-venturer.
- b. Prior to the commencement of a charitable sales promotion, the commercial co-venturer shall obtain the written consent of the non-profit organization whose name will be used during the charitable sales promotion.
- c. A final accounting for each charitable sales promotion shall be prepared by the commercial co-venturer following the completion of the promotion. A copy of the final accounting shall be provided to the director not more than twenty days after it is requested. A copy of the final accounting shall be provided to the charitable organization not more than twenty days after the copy is requested by the charitable organization. The final accounting shall be kept for a period of three years, unless the non-profit and the commercial co-venturer mutually agree that the final accounting shall be kept by the non-profit.

**Louisiana: La. Rev. Stat. Ann. § 51:1901.2**

- a. Prior to the commencement of any charitable sales promotion, a commercial co-venturer shall obtain the written consent of the non-profit whose name will be used during the charitable sales promotion.
- b. If determined, disclosure of the actual dollar amount or percentage per unit of goods or services purchased or used that will benefit the non-profit or charitable purpose shall be made in any sale or advertisement. In the event an actual dollar amount or percentage per unit of goods or services purchased or used that will benefit the non-profit or charitable purpose cannot reasonably be determined prior to the charitable sales promotion, an estimated amount or percentage shall be given in each advertisement for the charitable sales promotion.
- c. A commercial co-venturer shall keep a final accounting for each charitable sales promotion that it conducts for a period of three years following the charitable sales promotion.
- d. A final accounting shall be provided by the commercial co-venturer for each charitable sales promotion to the non-profit on whose behalf the charitable sales promotion was conducted or the state no more than ten days after it is requested.
- e. If determined to be essential to protect the general public from deceptive or fraudulent advertising, the state may adopt rules requiring commercial co-venturers to disclose in advertisements for a charitable sales promotion the actual or estimated amount or percentage of goods or services purchased that will benefit the non-profit, sponsor, or charitable purpose or sponsor purpose, and to disclose the specific name of the recipient non-profit.

**Maine: Me. Rev. Stat. Ann. Tit. 9 § 5008**

- a. A commercial co-venturer is required to register annually which includes paying a \$200 filing fee and securing a \$25,000 bond.
- b. A contract is required to be submitted by a commercial co-venturer within ten days after execution. There is no waiting period after the contract is submitted.
- c. A financial report is required to be filed by a commercial co-venturer for any charitable sales promotion at least 60 days prior to the registration expiration date that reflects data from the preceding calendar year. The report must include the following:
  - i. The name, mailing address, telephone number, and registration number of each commercial co-venturer and charitable organization involved;
  - ii. The date of any fund-raising campaign in which the commercial co-venturer was involved;
  - iii. The total dollar amount raised during each fund-raising campaign;
  - iv. The total dollar amount remitted to the charitable organization from each fund-raising campaign and for the year;
  - v. The total dollar amount retained by the commercial co-venturer from each fund-raising campaign and for the year;
  - vi. The total dollar amount received by the commercial co-venturer from each fund-raising campaign and for the year; and
  - vii. The total dollar amount remitted by the commercial co-venturer from each fund-raising campaign and for the year.
- d. Required Contract Provisions:
  - i. A statement of the charitable purpose to be described in the solicitation, and
  - ii. A statement of the percentage of the gross receipts from the charitable sales promotion which will be utilized exclusively for the charitable purposes described in the solicitation
- e. A commercial co-venturer shall maintain accurate and complete books and records of fund-raising activities and telephone solicitation scripts and shall keep those books and records available for inspection by the Attorney General or the office for a period of 3 years after the conclusion of each specific instance in which that person acts as a co-venturer.

**Massachusetts: Mass. Gen. Laws ch. 68 §§ 22-24**

- a. Commercial co-venturers are required to register annually and such registration must be renewed by December 31. Registration includes a \$50 filing fee and a \$10,000 bond.
- b. A contract and Notice of Solicitation are required to be filed prior to commencing the charitable sales promotion. There is no waiting period after the notice is filed.

- c. A financial report for each campaign is due by February 28 each year.
- d. Required Contract Provisions:
  - i. A statement of the charitable purpose to be described in the solicitation;
  - ii. A statement of the guaranteed minimum percentage of the gross receipts from fund-raising which will be utilized exclusively for the charitable purposes described in the solicitation, signed by two officers of the non-profit organization.

**New Hampshire: N.H. Rev. Stat. Ann. § 7:28-d**

- a. Notice of promotion must be filed by the non-profit organization prior to the commencement of a charitable sales promotion.
- b. Prior to the commencement of the charitable sales promotion there must be a contract which includes the following contract provisions:
  - i. Goods and services to be offered;
  - ii. Geographic area of offerings;
  - iii. Beginning and ending date of offering;
  - iv. Manner in which non-profit organization's name will be used including representations as to percent of proceeds to be received;
  - v. Maximum dollar amount to non-profit organization, if applicable;
  - vi. Number of units or services to be sold;
  - vii. Final accounting on a per unit basis to be provided to the non-profit organization and date by which it will be provided;
  - viii. Statement that the charitable sales promotion is subject to New Hampshire statutes; and
  - ix. How and when benefits will be conferred.
- c. Final accounting for the charitable sales promotion shall be kept for three years after promotion and shall be available to attorney general upon request.
- d. Co-venturer must disclose in each advertisement for the promotion the dollar amount or percent per unit of goods or services purchased or used that is to benefit the non-profit organization. If the actual amount cannot be calculated, the estimated amount shall be disclosed.

**New Jersey: N.J. Stat. Ann. § 45:17A-29**

- a. Non-profit organizations shall have a written contract with a commercial co-venturer that must be filed with the attorney general at least ten days prior to initiation of a charitable sales promotion.
- b. The non-profit organization must file with the attorney general the following information at the conclusion of the charitable sales promotion:

- i. Gross amount of income received that is attributable to the charitable sales promotion; and
  - ii. The amount of money remitted to the organization covering each event or portion of an extended charitable sales promotion.
- c. Co-venturer shall disclose in each advertisement for the charitable sales promotion the dollar amount or percent per unit of goods or services purchased or used that will benefit the non-profit organization. If actual amounts or percentages cannot be determined, co-venturer shall disclose a reasonable estimate of the dollar amount or percentage.

**New York: N.Y. Exec. Law § 173-a**

- a. A commercial co-venturer shall have a written contract with a non-profit organization prior to a charitable sales promotion. Co-venturer shall keep a copy of the contract on file for a period of three years after expiration or termination.
- b. Within ninety days after termination of the charitable sales promotion the co-venturer shall provide to the non-profit a report setting forth the number of items sold and the dollar amount of each sale from the charitable sales promotion. In the event the charitable sales promotion lasts longer than one year, the co-venturer shall provide the non-profit organization an interim report on the anniversary.
- c. A non-profit organization contracting with a commercial co-venturer on the date its next annual report is due to be filed with the attorney general, shall provide the following information:
  - i. A list of all commercial co-venturers authorized to use the non-profit organization's name during previous year and upcoming year;
  - ii. A statement of financial terms and conditions of each co-venturer contract; and
  - iii. A statement of whether each co-venturer has provided the required accounting report.
- d. A concise, accurate statement of the non-profit organization's right to cancel without cost for a period of fifteen days following the date on which said contract is filed with the attorney general.
- e. The address to which the notice of cancellation is to be sent.
- f. The address of the Secretary of State to which a duplicate of the notice of cancellation is to be sent.
- g. A clear statement of the financial arrangement.

**North Carolina: N.C. Gen. Stat. § 131F-18**

- a. Prior to commencement of any charitable sales promotion, the co-venturer shall obtain written consent of the non-profit whose name will be used during the promotion.
- b. Co-venturer shall prepare a final accounting for each charitable sales promotion. Upon request, the final accounting shall be provided to the non-profit or the state within ten days.

**Ohio: Ohio Rev. Code Ann. § 1716.09**

- a. The state requires the written consent of the non-profit organization whose name will be used during the charitable sales promotion;
- b. If it has been determined, disclosure of the actual dollar amount or percentage per unit of goods or services purchased or used that will benefit the non-profit organization or charitable purpose. In the event an actual dollar amount or percentage per unit of goods or services purchased or used that will benefit the non-profit or charitable purpose cannot reasonably be determined prior to the charitable sales promotion, an estimated amount or percentage shall be given in each advertisement for the charitable sales promotion.
- c. A commercial co-venturer shall keep a final accounting for each charitable sales promotion that it conducts for a period of three years.
- d. A final accounting shall be provided by the commercial co-venturer for each charitable sales promotion to the non-profit organization on whose behalf the charitable sales promotion was conducted or the attorney general no more than ten days after it is requested.

**Oregon: Or. Rev. Stat. § 128.848**

- a. The commercial co-venturer shall keep a final accounting for each commercial fund-raising solicitation it conducts for a period of three years following the completion of the campaign.
- b. The commercial co-venturer shall provide such accounting not later than twenty days after it is requested by the attorney general or any non-profit organization.

**Pennsylvania: 10 Pa. Cons. Stat. § 162.5**

When filing the required registration statement, the charity must disclose the names of any commercial co-venturers who are acting or who have agreed to act on behalf of the organization.



**South Carolina: S.C. Code Ann. § 33-56-70**

- a. The contract must be in writing and filed, along with a Notice of Solicitation form, with the Secretary of State at least 10 days before any solicitation activity.
- b. The contract must include the following:
  - i. The legal name and alias name, address, and registration number of the commercial co-venturer and the charitable organization;
  - ii. The name and residence address of each person directing or supervising the contract solicitation services;
  - iii. A description of the event or campaign;
  - iv. The commencement and termination date of the solicitation campaign;
  - v. A statement of the guaranteed minimum percentage of gross receipts to be remitted or retained by the charitable organization, excluding the amount which the charitable organization must pay for fundraising costs; and
  - vi. A statement of the percentage of gross receipts with which the commercial co-venturer is compensated, including the amount the commercial co-venturer must be reimbursed as payment for fundraising costs.

**South Dakota: S.D. Codified Laws §§ 37-30-1 et seq.**

Commercial co-venturers are not required to register with the Attorney General, but the contract between solicitor and charitable organization shall:

- a. Be in writing;
- b. Clearly state the respective obligations of the paid solicitor and the charitable organization; and
- c. State the minimum amount which the charitable organization shall receive as a result of the solicitation campaign.
  - i. Minimum amount shall be stated as a percentage of the gross revenue.
  - ii. Such minimum amount may not include any amount which the charitable organization is to pay as expenses of the solicitation campaign.
- d. Commercial co-venturer shall file a financial report with the attorney general no more than ninety days after a solicitation campaign has been completed, and on the anniversary of the commencement of any solicitation campaign which lasts more than one year.
  - i. The financial report shall include gross revenue and an itemization of all expenditures incurred.

**Utah: Utah Code Ann. § 13-22-22**

- a. Charitable organizations which agree to permit a charitable sales promotion to be conducted by a commercial co-venturer on its behalf shall file with the division a notice of the promotion prior to its commencement. Essentially, filing the agreement required below, or including the information as requested on the annual renewal registration will suffice.
- b. The State requires a written agreement. The terms are to be determined by rule. No such rule presently exists. We suggest using the same terms as set forth in connection with the requirements of other states.
- c. A final accounting must be kept by the commercial co-venturer for a period of three years after the end of the campaign and must be provided to the division upon request.
- d. The commercial co-venturer shall disclose in each advertisement for a promotion the dollar amount or percent per unit of goods or services purchased or used that will benefit the charity.

**Virginia: Va. Code Ann. § 57-61.2**

- a. A non-profit organization is required to be registered and the commercial co-venturer must have a written contract signed by an authorized representative of the commercial co-venturer and by two officers of the charitable organization.
- b. The commercial co-venturer shall keep a final accounting for each charitable sales promotion for a period of three years and make the final accounting available to the state upon request.

**Washington: Wash. Admin. Code § 434-120-212**

- a. A commercial co-venturer shall register as either a commercial fund-raiser or a commercial co-venturer before conducting any solicitations.
- b. A commercial co-venturer shall file a registration form and pay a registration fee of \$20.00. A commercial co-venturer need not post a surety bond.
- c. A commercial co-venturer shall file a copy of its written agreement with each non-profit organization for which it solicits. The written agreement shall:
  - i. Provide the name, address, and telephone number of the commercial co-venturer and the non-profit organization;
  - ii. Be signed by an officer of the non-profit organization and the person in charge of the commercial co-venturer;
  - iii. Specify how the commercial co-venturer's contribution to the non-profit organization as a result of the promotion shall be calculated, based upon an

- aggregate fixed dollar amount, a fixed dollar amount per sale, or a fixed percentage of gross revenue; and
- iv. State the non-profit organization's permission to use of its name.
- d. A commercial co-venturer shall keep on file at its principal place of business a financial statement reflecting the results of it(s) campaign(s) on behalf of each non-profit organization for which it raises funds. The commercial co-venturer shall produce this financial statement upon demand to the attorney general within ten business days.
  - e. A commercial co-venturer shall file a solicitation report on which the commercial co-venturer shall report:
    - i. A brief description of the fund-raising activity;
    - ii. The name of each non-profit organization with which it has contracted as a commercial co-venturer; and
    - iii. A disclosure of the planned financial contribution pursuant to contract with the named non-profit organization. A commercial co-venturer shall comply with this requirement by specifying how the commercial co-venturer's contribution to the non-profit organization as a result of this promotion shall be calculated, based upon an aggregate fixed dollar amount, a fixed dollar amount per sale, or a fixed percentage of gross sales revenue.

**Wisconsin: Wis. Stat. § 440.45**

The commercial co-venturer shall disclose in each advertisement for the charitable sales promotion the dollar amount, or percentage of price, per unit of goods or services purchased or used that will benefit the charitable organization or charitable purpose.

## Appendix B

### INTERNAL CONTROLS

The CEO shall not enter into any agreement which fails to advance the mission of the charity.

Accordingly, the CEO shall not:

1. Enter into any agreement which does not focus primarily on the charity's mission or which does not provide support for the charity's message.
2. Enter into an agreement which does not conform to a comprehensive overall strategy for such corporate relations.
3. Fail to involve relevant experts and volunteer leaders in the preliminary and developmental stages of a comprehensive cause related marketing strategy and in the development of specific agreements.
4. Enter into any agreement which does not provide fair and sufficient value, in funds or in-kind services, for the use of the charity's name and logo.
5. Fail to incorporate in any cause marketing contract an unconditional right to terminate the agreements.
6. Relinquish control of any public communications relating to the relationship.
7. Allow the charity's logo to appear on any mission-related product whose relationship to the charity's mission is not supported by science.
8. Grant general, comprehensive exclusivity to any single product or company which prevents the charity from forming relationships with any other products or companies. Limited exclusivity may be granted to one company for specially described discreet projects, events or promotions.
9. Enter into any agreement which grants an endorsement of any product, service, political candidate, or political cause.
10. Fail to report to the board, in the general information materials sent to members in advance, any agreements signed subsequent to the most recent meeting.

**Appendix C**

**THIRD PARTY CHARITABLE SALES PROMOTION AND LICENSING AGREEMENT**

[Enter full third party company name here]

This Third Party Charitable Sales Promotion and Licensing Agreement ("Agreement") is made as of the \_\_\_\_ day of \_\_\_\_\_, 200\_\_\_\_, by and between \_\_\_\_\_ ("Company"), a \_\_\_\_\_ [NOTE TO STAFF: fill in the state of the entity's incorporation and the entity type: e.g. a Georgia limited liability company. The following are entity types: corporation/partnership/limited liability company/not-for-profit corporation/other] with its principal place of business located at \_\_\_\_\_ at \_\_\_\_\_ whose telephone number is \_\_\_\_\_; and the Nonprofit, Inc. ("Nonprofit"), a \_\_\_\_\_ corporation, with its principal place of business located at \_\_\_\_\_, whose telephone number is \_\_\_\_\_.

The terms and conditions of this Agreement setting forth the details of the specific agreement between Nonprofit and Company are subject to the associated Third Party Charitable Sales Promotion and Licensing Master Terms and Conditions found at [http://www. \\_\\_\\_\\_\\_](http://www. _____) and incorporated herein by reference.

WHEREAS, Company is in the business of \_\_\_\_\_ in the United States;

WHEREAS, Nonprofit is tax exempt pursuant to determination by the Internal Revenue Service ("IRS") under section 501(c)(3) of the United States Internal Revenue Code (the "Code") whose mission is \_\_\_\_\_;

WHEREAS, Nonprofit owns well-known service marks, trade names, and logos; and

WHEREAS, Company and Nonprofit wish to enter into this Agreement to promote support for the mission of Nonprofit and to promote awareness of \_\_\_\_\_ issues through the promotion as further defined below;

NOW THEREFORE, in consideration of the mutual covenants contained in this Agreement, the parties hereto agree as follows:

**1. Sales Promotion and Territory.**

a) Company shall conduct a promotion from \_\_\_\_ to \_\_\_\_ (the "Promotion Period") advertised to the public as supporting the mission of Nonprofit.

b) During the Promotion Period, Company shall prominently promote and offer for sale \_\_\_\_\_ (the "\_\_\_\_\_") through its e-mail, database, Web site, and retail stores as listed on Exhibit A for a minimum purchase price of \$\_\_\_\_ of which \$\_\_\_\_ [or % of price] shall go to Nonprofit as a Royalty Fee in exchange for Company's use of the Nonprofit Design in connection with the sale of the \_\_\_\_\_ (the "Promotion"). [Any maximum/minimum must be included here]

c) All royalty fees due to Nonprofit shall be paid simultaneously with the delivery of the financial reports to which those fees relate as set forth in Section 4 of this Agreement.

d) Upon prior approval by Nonprofit, Company shall provide appropriate links from its Web site(s) to Nonprofit's Web site for mission-related information. Company shall bear the costs of its promotional efforts.

e) Sales of products pursuant to the Promotion will be made to United States residents in the fifty United States, the District of Columbia and United States territories (collectively, the "Territory"), unless otherwise specified in this Agreement. Although predicting future sales is inherently uncertain, Company expects to sell \_\_\_\_\_products during this third party charitable sales promotion.

**2. Term.** The term of this Agreement shall be from the Effective Date to \_\_\_\_\_ (the "Term"). Any extensions of the Promotion Period or the Term of this Agreement shall be by written amendment.

**3. Marketing and Better Business Bureau Disclosure Requirements.**

a) Company agrees that the Promotion and campaign shall be professional, of high quality, and shall reflect the mission of Nonprofit. Company agrees to disclose on its Web site and all other Promotional Material (as defined in the Master Terms and Conditions) the following information that is required to conform with Better Business Bureau standards and applicable state laws:

- i) the actual or anticipated portion of the purchase price or fee that will benefit Nonprofit;
- ii) the duration of the Promotion; and
- iii) any maximum or guaranteed minimum amount to be paid to Nonprofit.

In order to protect its name, good will and trademark rights, Nonprofit shall have the right to review and approve or disapprove all Promotional Material used in connection with the Promotion, prior to its use, according to the provisions of Section 3 of the Master Terms and Conditions. [All Company products shall include mission related material provided by Nonprofit to Company.]

b) For purposes of this Agreement, all recognition or acknowledgment of Company or any of its or any of its affiliates provided by Nonprofit shall satisfy, in the judgment of Nonprofit, the definition of "use or acknowledgment" contained in Treasury Regulations section 1.513-4(c), including without limitation the absence of "advertising" as defined in subsection (iv) of said regulations.

**4. Books, Records, and Reports.** Upon ten (10) days notice during business hours, Nonprofit shall have the right to examine books of accounts and records in Company's possession or under its control with respect to the subject matter and terms of this Agreement. Company shall provide quarterly financial reports to Nonprofit on or before a) April 30, \_\_\_\_ for sales made through March 31, \_\_\_\_; b) July 30, \_\_\_\_ for sales made from April 1 through June 30; c) October 30, \_\_\_\_ for sales made from July 1 through September 30; and d) December 31, \_\_\_\_ for sales made from October 1 through November 30; and Company shall provide a cumulative final year-end financial report on or before December 31, \_\_\_\_ [If not applicable due to length of Promotion lasting less than 3 months, replace language with "as a substitute for quarterly and final year end financial reports, Company shall provide a report with the payment of its royalty fee" or "by a certain date."] Each [The] financial report shall provide detail by specific promotion of the Promotion the number of items sold, the net proceeds, gross sales price of the product, any and all taxes, and the names, addresses, including zip codes, telephone numbers and e-mail addresses of the purchasers of the products and any other information as may be needed by Nonprofit for its accounting and legal compliance. Nonprofit will rely upon these reports in preparing its financial reporting to various state attorneys general for charitable sales promotions. These reports shall be deemed the "Accounting per unit" for the purposes of commercial co-venture regulations. Company and Nonprofit shall each keep on file at their principal place of business the final accounting per unit until the date calculated by adding three years to the date Nonprofit actually receives the final financial report from Company and shall make such accounting available to state regulatory authorities upon request. Nonprofit shall be responsible for further disbursements of funds received.

**5. Notices.** All notices, including notices of address change, required to be sent hereunder shall be in writing and shall be deemed to have been given when sent by certified, registered, or first class U.S. mail, or by Fed Ex or Airborne Express, or by fax with evidence of delivery to the addresses listed below unless otherwise noted in the Agreement.

**If to Company: With a duplicate copy to:**

\_\_\_\_\_

Attn: \_\_\_\_\_ Attn: \_\_\_\_\_  
 \_\_\_\_\_  
 FAX: \_\_\_\_\_ FAX: \_\_\_\_\_

**If to the Nonprofit:**  
**Nonprofit, Inc.**  
 Attn: \_\_\_\_\_  
 \_\_\_\_\_  
**FAX:** \_\_\_\_\_

**With a duplicate copy to:**  
**Chief Counsel**  
**Nonprofit, Inc.**  
 \_\_\_\_\_  
**FAX:** \_\_\_\_\_

**6. Counterparts and Signatures.** This Agreement may be executed in counterparts and forwarded by facsimile transmission by the parties, provided however, that duplicate original signature copies of this Agreement shall be kept on file by each party three (3) years beyond the expiration date of the Agreement. Each of the representatives signing this Agreement on behalf of the respective parties hereto represents and warrants that he or she has been duly authorized to execute and deliver this Agreement and that upon execution and delivery hereto, this Agreement shall be binding and enforceable in accordance with its terms against such party for whom such representative has signed.

[For Nonprofit Internal Use Only – any modifications to this Application Form or the associated Master Terms and Conditions must be included here as an additional Section]

**IN WITNESS WHEREOF,** the parties to this Agreement have executed it, as of the date first written above, by their duly authorized officers.

**[FULL LEGAL NAME OF COMPANY]:**  
 By: \_\_\_\_\_  
 Print Name: \_\_\_\_\_  
 Title: \_\_\_\_\_  
 Date: \_\_\_\_\_

**NONPROFIT, INC.**  
 By: \_\_\_\_\_  
 Print Name: \_\_\_\_\_  
 Title: \_\_\_\_\_  
 Date: \_\_\_\_\_

**NONPROFIT, INC.**  
 By: \_\_\_\_\_  
 Print Name: \_\_\_\_\_  
 Title: \_\_\_\_\_  
 Date: \_\_\_\_\_

EXHIBIT A

\_\_\_\_\_ Promotion  
Participating Locations  
[WEBSITE]

EXHIBIT B  
Nonprofit DESIGNS

To be graphically set forth in accordance with the standards set forth at [www.\\_\\_\\_\\_\\_](http://www._____).

**THIRD PARTY CHARITABLE SALES PROMOTION AND LICENSING AGREEMENT MASTER TERMS AND CONDITIONS**

**The following Master Terms and Conditions govern the Third Party Charitable Sales Promotion and Licensing Agreement between Nonprofit, Inc. ("Nonprofit") and the Company to which these Master Terms and Conditions relate. Capitalized terms used in these Master Terms and Conditions shall have the meaning defined in the associated Third Party Charitable Sale Promotions and Licensing Agreement. Hereinafter, these Master Terms and Conditions and the associated Third Party Charitable Sale Promotions and Licensing Agreement shall be referred to collectively as the "Agreement."**

**1. Proprietary Rights, Ownership, and Use of Nonprofit Design.**

(a) Company acknowledges Nonprofit's exclusive right, title and interest in its trade names, trademark, trade dress, and other indicia of origin owned by the Nonprofit. Subject to the terms and conditions of the Agreement, Nonprofit hereby grants to Company the limited non-exclusive, nontransferable, nonassignable, revocable right and license to use the Nonprofit's name and logo indicated on Exhibit B to the associated Third Party Charitable Sales Promotion and Licensing Agreement (collectively the "Nonprofit Design") solely in connection with the terms of the Agreement. All rights and licenses of any kind in the Nonprofit Design not expressly granted in the Agreement are exclusively reserved to the Nonprofit. Company agrees to use the Nonprofit Design only in accordance with Nonprofit logo policy and such other reasonable instructions as may be given by Nonprofit in writing pursuant to Section 3 of these Master Terms and Conditions. The Nonprofit Design shall not be altered or modified in any way whatsoever when used by Company other than as may be mutually agreed upon in writing by the parties hereto. Company shall include the registration notice "®" where appropriate on all marks and other materials related to Nonprofit and shall use the name "Nonprofit" in connection with all use of the words related to the promotion defined in the Agreement.

(b) In order to protect the Nonprofit Design, reputation, and established goodwill of the Nonprofit, Company must obtain prior written approval for each and every use of the Nonprofit Design and the Nonprofit name including, but not limited to its use on any Web pages, audio, video, script, print advertising, promotional and marketing materials, press releases, or other related materials (collectively the "Promotional Materials") regardless of the medium. Such approvals will be provided in accordance with Section 3 of these Master Terms and Conditions. Company represents and warrants that it will not use or allow others to use Nonprofit intellectual property without the prior written approval of Nonprofit.

(c) Nonprofit warrants that it has the exclusive ownership rights to the Nonprofit Design and that it has the legal right to enter into agreements relating thereto. In the event of any infringement or improper use of the Nonprofit Design, Nonprofit represents that it will vigorously protect its interests. Company and Nonprofit mutually agree to cooperate with each other in the protection of each party's intellectual property rights as they relate to the Promotion and the Agreement.

**2. No Endorsement.**

Nonprofit does not endorse or promote any of Company's products, services, political candidates, or political causes. Further, Company agrees that it will not use the Nonprofit Design in any way that would imply endorsement of Company or demean, defame, embarrass, diminish or cause any harm to the Nonprofit. Nonprofit's name and the Nonprofit Design may not be listed on any of Company's Promotional Materials or client lists without Nonprofit's prior written approval pursuant to the terms of the Agreement.

**3. Approvals.**

Unless otherwise agreed in writing, Nonprofit shall have at least twelve (12) business days from the date of receipt to review and approve all use of the Nonprofit Design and all promotional materials, and such approval shall not to be unreasonably withheld. A fax or an e-mail shall be deemed a "writing" for the purposes of such approval. All such materials shall be directed to Nonprofit, Director, Cause-Related Marketing, for approval. In addition, the final copy of all such materials shall be provided to Nonprofit at least five (5) business days prior to public distribution.

**4. Termination.**

Pursuant to Nonprofit Executive Limitation Policy #\_\_\_\_, Nonprofit reserves the unconditional right to terminate the Agreement upon 30 days written notice to Company. Additionally, Nonprofit has the right to terminate the Agreement for purposes of any charitable sales promotion directed to New York residents, upon fifteen days notice following the date upon which the Agreement is filed with the New York Attorney General. Notices of termination shall be sent to Company at the address and to the attention of the contacts set forth in the Notice Section of the Third Party Charitable Sale Promotions and Licensing Agreement, with a duplicate copy to the New York Secretary of State, New York Department of State, 41 State Street, Albany, NY 12231. Company reserves the right to terminate the Agreement upon 30 days written notice to Nonprofit. Notices of termination to Nonprofit shall be sent to Nonprofit, Attention: Director, Cause-Related Marketing, *[place address here]*, with a copy to Chief Counsel, Nonprofit, *[place address here]* with a duplicate copy to the New York Secretary of State, New York Department of State, 41 State Street, Albany, NY 12231. In the event of termination, Company shall immediately cease to use the Nonprofit Design in its promotional materials and shall immediately discontinue references in any manner to its relationship with Nonprofit. Company shall make commercially reasonable efforts to recall and destroy all promotional materials from Company's facilities, its affiliates' facilities and participating retail locations, e-mail database and Web site. In the event of termination, the year-end cumulative financial report, or other required report, required to be sent by Company to Nonprofit shall be sent on or before thirty days from the effective termination date of the Agreement and shall be cumulative for the time period of the Agreement from the date of execution of the Agreement to the date of the effective termination. In the event sales of product involving in some way the name of the Nonprofit are made following termination of the Agreement, Company shall pay

Nonprofit royalty fees in accordance with the terms of the Agreement and shall provide financial reports in accordance with the terms of the Agreement.

#### 5. Confidentiality.

(a) Company understands and agrees that Nonprofit is engaged in a service which makes it crucial for Nonprofit to develop and retain trade secrets, donor lists, proprietary techniques, information regarding donors and constituents, including personal health information, and other confidential information, and acknowledges that Company may develop and learn such information in the course of its performance of work under the Agreement. In light of these facts and in consideration of Company's collaboration with Nonprofit, Company covenants and agrees with Nonprofit that it shall protect all Nonprofit Confidential Information (as defined below) at all times, both during and after the Term, and shall not disclose to any Person, or otherwise use, except in connection with its duties performed in accordance with the Agreement, any Nonprofit Confidential Information. For purposes of the Agreement, "Nonprofit Confidential Information" shall mean any and all technical, business, and other information of Nonprofit or any affiliate of Nonprofit which derives value, economic or otherwise, actual or potential, from not being generally known to the public or other Persons who can obtain value from its use or disclosure (other than the party disclosing such information and its affiliates), including without limitation, technical or nontechnical data, compositions, devices, methods, techniques, drawings, inventions, processes, financial data, financial plans, product plans, donor lists, lists of or information concerning actual or potential donors or suppliers, and information regarding the strategies, business plans or operations, methods and plans of operation, marketing strategies of Nonprofit or any affiliate of Nonprofit and personal health information of Nonprofit constituents. Nonprofit Confidential Information includes information disclosed or owned by third parties (including information of any affiliate of Nonprofit) that is either 1) treated by Nonprofit as confidential of 2) which Nonprofit is required to treat as confidential, whether such obligation is contractual or arises by operation of law. For purposes of the Agreement, Nonprofit Confidential Information shall not include confidential business information that does not constitute a trade secret under applicable law after the third anniversary of the termination of the Agreement but will remain subject to any other limitation of use or disclosure under any other agreement, applicable law or otherwise; *provided, further*, that such obligation shall continue indefinitely with respect to confidential business information that constitutes a trade secret under applicable law and personal health information of Nonprofit constituents. In addition, under no circumstance shall Company provide Nonprofit Confidential Information or any information associated with the Agreement to any political candidate or party that could be used in support or opposition to any political candidate or party. As used in the Agreement, "Person" means any individual, corporation, limited liability company, bank, partnership, joint venture, association, joint-stock company, trust, unincorporated organization or other entity.

(b) The obligations of Section 5(a) shall not apply to (i) any information which is in or comes into the public domain through no fault of Company, (ii) any information in the possession of Company in written form as of the date hereof or hereafter independently developed by Company without reference to any Nonprofit Confidential Information, or

(iii) any information which is required to be disclosed by order of a court or tribunal of competent jurisdiction or by any law.

#### 6. Compliance with Laws.

To the extent the Territory includes Georgia and New Hampshire, the charitable sales promotion evidenced by the Agreement is subject to the provisions of charitable sales promotion laws in various states, including but not limited to Georgia Statutes, Title 43, Chapter 17 and New Hampshire Statutes, Chapter 7 to the extent the Territory includes Georgia and New Hampshire.

#### 7. Indemnification.

(a) Company agrees to protect, indemnify, defend and hold harmless Nonprofit and all its affiliates, and their directors, officers, agents and employees from all claims, actions, suits, proceedings, investigations, arbitrations, assessments, losses, damages, liabilities, settlements, penalties, costs and expenses, including reasonable attorney fees and those fees of in-house counsel, based upon the salary, proportion of benefits and time of such in-house counsel (collectively, "Claims"), incurred by Nonprofit resulting from or in connection with (i) any act, omission or misrepresentation by Company constituting negligence or breach by Company of its obligations or warranties under the Agreement; (ii) any unauthorized use of any materials, content, public statements, releases, reports, or information by Company under the Agreement; (iii) any infringement of trademark, patent, copyright, trade name, service marks or similar rights of Nonprofit or any other third party; (iv) any libel, slander, defamation or invasion of the right of privacy, publicity or property of, or violation or misappropriation of any other right of any third party by Company; (v) any agreements or alleged agreements made or entered into by Company to effectuate the terms of the Agreement; and (vi) any claim or action by any third party for bodily injury, illness, or death alleged to have been caused, in whole or in part, by any Company merchandise. Company further agrees to protect, indemnify, defend and hold harmless Nonprofit and all its affiliates, and their directors, officers, agents and employees from all Claims incurred by Nonprofit resulting from or in connection with Federal, state and local tax liabilities, including but not limited to unrelated business taxable income with respect to Company's relationship with Nonprofit.

(b) Nonprofit agrees to protect, indemnify, defend and hold harmless Company and all its affiliates, and their directors, officers, agents and employees from all Claims incurred by Company resulting from or in connection with (i) any act or omission of Nonprofit; (ii) any misrepresentation or breach of warranties made by Nonprofit in the Agreement; and (iii) any noncompliance by Nonprofit with any covenant, agreement, or undertakings, contained in the Agreement.

(c) The party seeking indemnification pursuant to the Agreement ("Indemnitee") shall promptly give the other party notice of any Claim for which indemnification is required hereunder and afford the other party the opportunity to defend any such event.

The party obligated to provide the indemnification ("Indemnitor") shall, at its own expense and through counsel of its own choosing, defend or otherwise contest any such Claim for which indemnification is required pursuant to the Agreement.

(d) The Indemnitee shall also have the right, but not the obligation, to participate at its own expense in the defense thereof with counsel of its own choice, and the parties agree to coordinate their efforts. If the Indemnitor fails, within thirty (30) days of receipt of notice of any such claim, action, suit, proceeding, investigation, or arbitration for which indemnification is required, to notify the Indemnitee of its intent to defend, contest, or otherwise protect against such event, the Indemnitee shall have the right to defend, settle and satisfy any such event and recover the costs of the same from the Indemnitor.

(e) Company shall apprise Nonprofit as soon as practicable of any infringement of the Nonprofit Design which comes to the attention of Company. Nonprofit shall prosecute and defend any action or proceeding which Nonprofit deems necessary or desirable to protect the Nonprofit Design, including but not limited to actions or proceedings involving infringement of the Nonprofit Design. In addition, Company shall notify Nonprofit of all confusingly similar uses of the Nonprofit Design by third parties. Any and all damages recovered in any action or proceeding commenced by Nonprofit shall belong solely and exclusively to Nonprofit.

(f) This indemnification obligations of each party shall survive the expiration or earlier termination of the Agreement.

#### **8. [Intentionally Omitted]**

#### **9. Insurance.**

Prior to commencing activity under the Agreement, Company shall obtain, and thereafter maintain, commercial general liability insurance (including product and contractual liability insurance in an Occurrence form), providing adequate protection for Nonprofit as an additional insured on Company's policy from and against any and all Claims, resulting from or in connection with any of the circumstances described in Section 7(a) of the Agreement. Such insurance policy shall not be canceled or materially changed in form without at least thirty (30) days written notice to Nonprofit. Company agrees that such insurance policy or policies shall provide coverage of at least Five Million Dollars (\$5,000,000) for personal, advertising and bodily injury arising out of each occurrence, and not less than Ten Million Dollars (\$10,000,000) for aggregate claims during a twelve (12) month period or Company's standard insurance policy limits, whichever is greater. However, recognizing that the aforesaid amounts may be inappropriate with regard to specific situations, it is contemplated that Nonprofit may make reasonable adjustments to the foregoing amounts. Any adjustment to the aforesaid amount must be confirmed in writing by Nonprofit's Risk Management Director. Company shall provide Nonprofit with a copy of a Certificate of Insurance evidencing such insurance on or before 10 days following execution of this Agreement.

#### **10. Entire Agreement/Amendment.**

The Agreement represents the entire agreement between the parties on this matter and supersedes any and all prior understandings, agreements, representations or undertakings. The Agreement is not subject to amendment, change or modification except by written agreement signed by both parties. Any amendments to the Agreement shall specifically refer to the Agreement.

#### **11. Severability.**

The covenants set forth in the Agreement shall be considered and construed as separate and independent covenants. Should any part or provision of any covenant be held invalid, void or unenforceable in any court of competent jurisdiction, such invalidity, voidness or unenforceability shall not render invalid, void or unenforceable any other part or provision of the Agreement.

#### **12. Applicable Law and Jurisdiction.**

THE AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF \_\_\_\_\_ WITHOUT REGARD TO THE CONFLICT OF LAWS PROVISIONS THEREOF, AND THE STATE AND FEDERAL COURTS LOCATED IN \_\_\_\_\_ COUNTY, \_\_\_\_\_ SHALL HAVE EXCLUSIVE JURISDICTION OF THE PARTIES FOR THE PURPOSES OF ADJUDICATING ALL DISPUTES THAT MAY ARISE UNDER THE AGREEMENT. THE PARTIES HEREBY WAIVE ALL OBJECTIONS TO VENUE AND PERSONAL JURISDICTION IN THESE FORUMS FOR SUCH DISPUTES AND AGREE THAT SERVICE OF PROCESS MAY BE MADE BY CERTIFIED MAIL ADDRESSED TO THE COMPANY'S NAME AND ADDRESS GIVEN IN THE FIRST PARAGRAPH OF THE AGREEMENT, TO THE ATTENTION OF THE PERSON(S) SIGNING BELOW. THESE CONTACT PERSON(S) OR ADDRESS(ES) MAY BE AMENDED PURSUANT TO THE NOTICE PROCEDURE OF THE INDIVIDUAL AGREEMENT BETWEEN NONPROFIT AND COMPANY.

#### **13. Assignment.**

This Agreement is not assignable, either directly or indirectly by Company without the prior written consent of Nonprofit, which consent may be withheld by Nonprofit in its sole discretion. A merger or change in control of Company shall constitute an assignment. The Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective heirs, executors, administrators, personal representatives, successors and permitted assigns.

#### **14. Captions and Headings.**

The captions and section headings used in the Agreement are for convenience of reference only and shall not affect the construction or interpretation of the Agreement or any of the provisions thereof.

**15. Nonexclusivity.**

The Agreement is a non-exclusive agreement, which preserves the right of Nonprofit to contract with other companies for similar and related promotions.

**16. No Third Party Beneficiaries.**

The Agreement inures to the benefit of Company and Nonprofit only, and no third party shall enjoy the benefits of the Agreement nor shall have any rights under it except as expressly provided in the Agreement.

**17. Force Majeure.**

Neither Company nor Nonprofit shall be deemed to be in default of any provision of the Agreement, or for failures in performance, resulting from acts or events beyond its reasonable control (a "Force Majeure Event") for the duration of the Force Majeure Event. Such Force Majeure Events shall include, but are not limited to acts of God, civil or military authority, terrorists, civil disturbance, war, strikes, fires, other catastrophes, labor disputes, parts shortages, or other events beyond Company's or Nonprofit's reasonable control.

**18. Conflicts of Interest.**

Company represents and warrants to Nonprofit as follows:

- (a) None of Company's employees, officers or majority owners is employed by or are on the Board of Nonprofit; and
- (b) Company will not enter into any such contract or agreement, or execute any such document, which will create a conflict of interest or which will prevent it from freely performing any of the provisions of the Agreement.

**19. Survival.**

The representations and warranties contained in the Agreement shall survive the termination of the Agreement.

**20. Waiver and Breach.**

The waiver by either party of any default or breach of the Agreement shall not constitute a waiver of any other or subsequent default or breach.

**21. Independent Contractors.**

Company and the Nonprofit are independent contractors. Nothing in the Agreement shall be construed to create a partnership, joint venture, or agency relationship between the parties.

**Appendix D**

**CAUSE MARKETING PROMOTIONAL MATERIALS CHECKLIST**

	The money that the charity receives for cause-related marketing contracts should not be characterized as a donation. Instead, the promotional materials should state that "[charity name] will receive [X] amount for each [ABC] sold."
	Promotional materials, which should be consistent with the contract, must state the amount of funds that the charity will receive. It's important to avoid vague statements like "Proceeds to benefit the [charity name]."
	The promotional materials must state the exact duration of the charitable sales promotion.
	The promotional materials must state the minimum or maximum amount that the charity will receive (if there is a minimum/maximum in the contract).
	Because [charity name] should not drive business to a for profit business, the promotional materials must contain contact information for the vendor (website, phone number, mailing address) if contact information for the charity is also provided. In addition, the promotional materials must state that the charity contact information is for mission related information only.
	Placement of logos/tradenames is important – charity cannot appear to endorse products, services, political candidates or political causes.
	No comparative or qualitative language may be used, like "great" or "better than" in reference to a company, product or service.
	If the material refers to an event that the charity owns, charity ownership of the event must be explicit (e.g., the American Cancer Society's Great American Weigh In).
	Joint press releases may be problematic as the charity must ensure that the press release does not appear to be an endorsement of the sponsor's products and does not contain a call to action. In some cases, the sponsor will try to include comparative or qualitative descriptions of its company and/or products in the press release or a call to action, but this must be avoided to prevent the revenue from the cause marketing campaign from being subject to UBIT.  <i>e.g., Press releases should state "[Company] locations can be found at www.company.com" instead of "visit your local [Company]" as "visit" could be construed as a call to action. Similarly, the press release should state "[Company's] toll free number is [XXX-XXX-XXX]" instead of "call ABC at [XXX-XXX-XXXX]" as the word "call" could be deemed a call to action.</i>