



Good Eats, Good Cause: Legal Rules and Pitfalls for Charitable and Socially Beneficial Food Marketing

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Who Gives a #*%! ?

Commercial Coventurers and
Charitable Sales Promotions

Food Advertising, Labeling &
Litigation Conference
Food and Drug Law Institute
September 26-27, 2018



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Actual Client Product*



* Client and product have been changed

Actual Charitable Sales Promotion*



* Promotion has been changed

Actual Comment on Facebook*



“Be careful about claiming that sales will be going to a charity. That means you are a “commercial co-venturer” and need to register and report to the state. I researched the issue two years ago and concluded it was more trouble than it was worth.”

* The comment has been changed

Actual Email from my client*



From: Client

To: Lawyer

Subject: some dumb*&! thinks he knows everything

Attachment: Facbookpost.pdf

“This dude is a total Debbie-downer x 1 million but I want to make sure I don’t get in trouble. Who is going to give a #*%! about donating to animal rescue for f’s sake!?”

* Actually, this is pretty close to the real one

Why Engage in Charitable and Socially Beneficial Food Marketing?

- Consumers actively seek out manufacturers, retailers and brands that will do good on their behalf.
- Given a choice, consumers will increasingly opt for ethical/moral brands.
- 64% of primary grocery shoppers believe that it's important for grocery retail channels to support local charities and organizations.
- 91% of global consumers are likely to switch brands to one associated with a good cause, given comparable price and quality.
- Charitable partnerships can be tie-breakers between products that are similar in terms of price and quality at shelf.



Sources of Law Governing Commercial Coverturers

- Advertising Laws
 - FTC Act
 - State consumer protection statues
- Industry Guidelines
 - BBB
 - State guidelines (NY)
- Specific State Laws re Commercial Covertures
- Tax Laws

- NY CLS Exec § 171-a
 - “Commercial Co-venture: Any person who for profit is regularly and primarily engaged in trade or commerce . . . And who advertises that the purchase or use of goods, services, entertainment or any other thing of value will benefit a charitable organization.”
- NC Gen. Stat. § 13F-2
 - “‘Charitable sales promotion’ means an advertising or sales campaign that represents that the purchase or use of goods or services offered by a coventurer is to benefit a charitable organization.”

State Commercial Coventurer Statutes

- State charity statutes regulate:
 - (1) Charities
 - (2) Professional fundraisers
 - (3) Commercial coventurers

State Commercial Coventurer Statutes Typical Provisions

- **Registration or filing (13 states)**
 - notice, fee, bonds, closing statements
- **Written Contract (19 states)**
 - Nature of donation, Accounting, Termination
- **Disclosure Requirements (at least 15 states)**
 - Mandatory disclosures
 - Amount per unit, identity of charity
 - Prohibited content

R = State registration/filing requirement
 K = written contract requirement
 D = statute addresses specific disclosures
 O = Other



1. Alabama (R, K) Ala. § 13-A_9-71
2. Arkansas (R, K, D) A.C.A. § 4-28-401
3. California (K, D) C.G.C. § 12599.2
4. Colorado (D) C.R.S. § 6-16-110
5. Connecticut (R, K) C.G.S. § 21a-190a
6. Florida (K, D) Fla. Stat. § 496.404
7. Georgia (K, D) O.C.G.A. § 43-17-2
8. Hawaii (K, R) HRS § 467B-1
9. Illinois (R) I.A.C. § 480.30
10. Louisiana (R, K, D) La. R.S. § 51.1901
11. Maine (repealed)
12. Massachusetts (R, K, D) M.G.L. 68 § 18
13. Michigan (O) MCLS § 400.288
14. Mississippi (R) CMSR 01-000-150
15. New Hampshire (R, K, D) RSA 2:28-d
16. New Jersey (R, K, D) NJ Stat. § 45:17A-20
17. New York (R, K) NY CLS Exec. § 171
18. North Carolina (K, D) N.C. Gen. Stat. § 131F-2
19. Ohio (K, D) ORC § 1716.01
20. Oregon (K, D) ORS § 128.801
21. Pennsylvania (O) 10 P.S. § 162.3
22. South Carolina (R, K) S.C. Code § 33-56-70
23. Tennessee (R, K) TN Code § 48-101-501
24. Utah (R, K, D) UCA 13-22-15
25. Vermont (D) Vt. Stat. 9 § 2481a
26. Virginia (K) Va. Code § 57-48
27. Washington (O) Was. Rev. Code § 19.09.020
28. Wisconsin (D) Wis. Stat. § 202.11

- This slide addresses statutes that impose requirements on commercial entities. Other requirements may apply to charities.

Better Business Bureau Standard 19

- Clearly describe promotion at point of sale
 - Actual or Estimated amount or % of purchase price donated
 - Do not use vague terms like “proceeds” and “profits”
 - Dates
 - Maximum Donation/Guaranteed Minimum Donation
- “5 cents will go to ABC Charity for every box of XYZ Cereal sold in October up to a maximum of \$200,000.”
- “Depending upon the specific item purchased, approximately 5 - 10% of your purchase price will go to Charity ABC.”

NY Attorney General Best Practices (2012)

1. Clearly (and prominently) describe promotion
 - Charity, nature of donation, consumer action required
2. Donation amount easy to determine
 - Dollar amount or % of retail price (not “part of the profits”)
3. Transparency
 - Disclose donation limits, caps; don’t overproduce product
4. Same disclosures in social media
5. Follow up by announcing amount raised

**For each participating Unilever product purchased at Walmart from April 2- April 30, 2018, Unilever will donate the monetary equivalent of at least 1 meal (\$0.10) to Feeding America®. For a full list of participating Unilever products, go to Walmart.com/FightHunger. Unilever guarantees a minimum total donation of \$150,000. Maximum total donation: \$2,000,000. \$1 helps provide at least 10 meals secured by Feeding America on behalf of local member food banks.*

Suppliers Who Participated



Thank you for helping us feed the fight against hunger.

Hunger is closer than you think. 1 in 8 Americans struggles with hunger. Thank you for helping us Fight Hunger in America. Your actions have made a big difference.

Total Meals Secured in 2018

232,167,989

*This number is an estimate based on available data and is subject to change.

Confusing/Incomplete Disclosures



Non-Compliance

A GIFT THAT GIVES BACK!

Begun in 2012, **Operation: Teddy Bear's** mission is to raise money to **support our troops and their families**. \$5 of every Small* bear, \$10 of every Medium* bear, and \$20 of every Large* bear purchased will be **donated to Operation Homefront** each month. Through December 2017, **over \$1,000,000 has been raised and contributed to military charities**. By **purchasing** one of these adorable (and heroic) little bears, you will help support our military communities!

*Approximate size of Small Bears is 11", Medium Bears is 16" and Large Bears is 30".

**PLEASE HELP US REACH OUR 2018 YEAR-END
GOAL: \$200,000**

In support of...



www.OperationHomefront.org



Alleged Fraud



Attorney General v. Bach, 81 Mass. App. Ct. 1126 (2012)

- **DO** coach brands on their options, highlighting the advantages and disadvantages up front.
- **DO** get clarity on the exact language the brand plans to use in all iterations.
- **DON'T** align on claims/label copy before a CCV with the charity is finalized.
- **DO** ensure that in a CCV arrangement the consumer's actions are meaningful.
- **DO** always consider placement of the disclosure (clear + conspicuous at time of purchase) and ensure that all material terms are included in all assets (charity may have additional disclosure requirements).
- **DON'T** forget to track donations internally and externally. If feasible, maintain a consumer-facing website that tracks donations in real-time.

- Transparency
- Participation must be easy
- Tie charitable efforts to a companies' products/services
 - (i.e. Tom's buy a pair give a pair)
- Pick a top cause
- Make it social
- Ensure strong strategic fit
- Allow sufficient time for CCV process
 - registration and bonding in all applicable jurisdictions



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The Green Guides



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Specific Claims Covered

- General Environmental Benefits
- Carbon Offsets
- Certifications and Seals
- Compostable
- Degradable
- Free-Of
- Non-Toxic
- Ozone-Safe/Ozone-Friendly
- Recyclable
- Recycled Content
- Refillable
- Renewable Energy
- Renewable Materials
- Source Reduction



Certifications/Logos/Seals

- **Endorsements**
- **Disclose material connections**
Any “connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement.”





News & Events » Press Releases » FTC Sends Warning Letters about Green Certification Seals

FTC Sends Warning Letters about Green Certification Seals

Goal Is to Ensure Seals Are Informative and Do Not Deceive Consumers

FOR RELEASE

September 14, 2015

TAGS: Bureau of Consumer Protection | Consumer Protection | Advertising and Marketing | Endorsements | Environmental Marketing

The staff of the Federal Trade Commission has sent warning letters to [five providers of environmental certification seals](#) and [32 businesses using those seals](#), alerting them to the agency's concerns that the seals could be considered deceptive and may not comply with the FTC's environmental marketing guidelines.

"Environmental seals and certifications matter to people who want to shop green," said Jessica Rich, Director of the FTC's Bureau of Consumer Protection. "But if the seals' claims are broader than the products' benefits, they can deceive people. We are holding companies accountable for their green claims."

Green Certification Examples

Good Example



If this seal is accurate, it's **not deceptive** because it lists the specific attributes that form the basis for the product's certification.

In the FTC's Green Guides, Section 260.6, example 7, there is an example for when it is impractical to clearly list all applicable attributes adjacent to the seal itself.

Bad Example



This seal **may be deceptive** because it does not convey the basis for the certification. It is highly unlikely that marketers can substantiate all the attributes implied by general environmental benefit claims. That's why marketers should only use environmental certifications or seals that convey the basis for the certification.



[In English](#)

[En Español](#)

For Consumers

Blog: [Does green label = green product? It should.](#)

[Shopping Green](#)

For Businesses

Blog: [Performing seals](#)

[Environmental Marketing](#)

Media Resources

Our [Media Resources](#) library provides one-stop collections of materials on numerous issues in which the FTC has been actively engaged. These pages are especially useful for members of the media.

Recyclable

Who has access to recycling facilities?

- Qualify claim if less than substantial majority (<60%), qualify.
- If item is collected, but not actually recycled, may be deceptive

Degradable



(K-mart Corp., No. 082
3186 (June 9, 2009)

Qualify Unless: “*Entire [item] will completely breakdown and return to nature within a reasonably short period of time [one year] after customary disposal” [landfill]*”

Biodegradable Plastics Cases

October 2013

- ◎ Case against ECM for claims that plastics made with ECM additive are biodegradable
- ◎ FTC allegations:
 - Claims that additive rendered plastics “biodegradable” were deceptive
 - Claims that additive rendered plastics biodegradable within nine months to five years in a landfill were deceptive

Sustainable and Natural

- No generalized guidance – lack of consumer perception evidence
- Marketers are subject to FTC Act's general proscriptions against unfair or deceptive marketing.
- Commission may bring enforcement actions at its discretion.

Organic

- ◎ Lack consumer perception evidence
- ◎ Concern about consistency with USDA
- ◎ FTC/USDA research/roundtable – 2016:
non-agricultural products (e.g.,
shampoo/mattress)
- ◎ Qualify your claim
- ◎ Enforcement – Moonlight Slumber - 2017