

WHAT'S IN A NONPROFIT'S NAME?

PUBLIC TRUST, PROFIT AND THE POTENTIAL FOR PUBLIC DECEPTION

A PRELIMINARY MULTISTATE REPORT ON NONPROFIT PRODUCT MARKETING

APRIL 1999

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EXECUTIVE SUMMARY

The use of partnerships between commercial entities and nonprofit organizations to market commercial products using the names and logos of the nonprofit organizations is a growing trend that raises significant legal and policy concerns. The Attorneys General of sixteen states and the District of Columbia Corporation Counsel,¹ after consulting with numerous participants in such joint promotional campaigns, as well as with others, have produced this preliminary report as a first step towards a final report that will inform interested parties and the public about the consumer law standards and policy considerations applicable to such campaigns. The final report will be prepared following receipt of comments on this preliminary draft and other information from interested parties in a public forum to be scheduled in the near future.

Based upon their review to date, the Attorneys General believe that commercial-nonprofit product advertisements often communicate the false and misleading messages that the products have been endorsed by the nonprofit partner in the commercial-nonprofit relationship and that such products are superior to other competing products. The Attorneys General are concerned that some promotions may further mislead the public about the effect consumers' purchases may have on the level of charitable contributions the commercial sponsor will make. Additionally, such joint advertising campaigns using a respected nonprofit's name and logo often fail to provide important information consumers need in order to make informed choices, including the facts that the commercial sponsor has paid the nonprofit organization for use of its name and logo and, as is often the case, that the relationship between the corporate sponsor and the nonprofit is exclusive in nature.

In the recent past, the false or misleading nature of such messages has led to both state and federal law enforcement actions, as well as private litigation. The Attorneys General hope that issuing this preliminary report to clarify the consumer law obligations incumbent upon the participants in commercial-nonprofit relationships will obviate the need for future enforcement actions.

The Attorneys General have identified the following key principles in this important public protection area:

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 when that is the case.

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.

INTRODUCTION

This preliminary multistate report by the Attorneys General of the States of Arkansas, California, Connecticut, Florida, Illinois, Kentucky, Maryland, Minnesota, Missouri, New Jersey, New Mexico, New York, Pennsylvania, Texas, Vermont and Wisconsin, and the District of Columbia Corporation Counsel, focuses on a growing marketing phenomenon of significant public importance - commercial-nonprofit product advertising. In recent years there has been a marked increase in nationwide advertising campaigns in which the names and logos of well recognized, major nonprofit organizations have been featured prominently in the marketing of various commercial products. These multimedia advertising campaigns have reached millions of American consumers.

Such commercial-nonprofit advertising generally flows from a licensing agreement between a commercial product marketer and a leading nonprofit organization. The nonprofit organization agrees to sell the right to use its name and logo in the promotion of the commercial sponsor's products. In return, the commercial sponsor pays the nonprofit organization substantial amounts of money for the use of the nonprofit's name and logo in

product advertising and through its marketing campaign provides significant publicity for the nonprofit and its message. Many of the products (often prescription or over-the-counter drugs) marketed in this manner use health related messages in their marketing campaigns and use associations with health related nonprofits to reinforce those messages.

This growing marketing trend raises a number of significant legal and policy concerns. These advertising campaigns have the potential to violate state consumer laws prohibiting false advertising, deceptive trade practices and consumer fraud in numerous ways. Advertisements using a nonprofit's name and logo may communicate that the nonprofit has endorsed the advertised product. Such an advertisement is misleading if the nonprofit has not actually endorsed the product. In fact, nonprofit organizations generally have longstanding internal policies precluding endorsements of commercial products. Commercial-nonprofit advertising may also mislead the public into believing that the advertised product, marketed with the name of a respected, trusted nonprofit organization, is better than or superior to other products in the same category. In fact, the nonprofit organization selling the use of its name and logo to the commercial sponsor may never have made any determination that the advertised product is better than others.

These commercial-nonprofit marketing alliances are usually exclusive in nature, so that only the manufacturer able to pay for and enter into a licensing agreement with the nonprofit organization obtains the use of the nonprofit's trusted name. Such exclusivity, which increases the potential for deceiving the public into the belief that the product bearing the nonprofit's name is superior, is typically not disclosed to consumers in product advertising.

Product advertisements using a familiar nonprofit's name and logo may also mislead or confuse the public about the extent to which consumers will be benefiting the nonprofit or a charitable cause through their buying decisions. The Attorneys General are further concerned about the failure to disclose important information to the public, including the fact that the commercial entity has paid for the use of the nonprofit's name and logo.

This preliminary report is intended as a positive contribution toward educating the nonprofit community, commercial sponsors and the public, so that such advertising practices not only conform with the letter of state consumer laws but also further their purposes and thereby benefit the public by providing non-deceptive, truthful information to guide consumers in making informed choices among competing products and services. Truthful, non-misleading communications concerning the meaning and significance of nonprofits' names and logos in product advertising will ensure that the public is not misled and receives the disclosures necessary to make sound purchasing decisions.

This preliminary report consists of three parts. The first provides background information about the growing trend of advertising products through the use of major nonprofits' names and logos. This section also discusses, for illustrative purposes, several specific advertising campaigns that have proved problematic and that exemplify potential abuses in this marketing area. The second part identifies central consumer law standards and a number of guidepost principles which should provide useful guidance to commercial sponsors and nonprofits in complying with state consumer laws. The final section of the report

touches upon some of the policy considerations implicated by the trend of promoting products through commercial-nonprofit marketing alliances, including the potential impact on nonprofits' most important asset -- the integrity of their names and reputations -- and on the high level of trust placed by the public in these organizations, especially those whose central mission involves promoting public health.

MULTISTATE PROCESS

This preliminary report is one step in a multistate process designed to ensure careful review of commercial-nonprofit advertising practices, to encourage widespread input from multiple sources involved in or affected by such practices, and to facilitate broad dissemination of and discussion on the contents of this report -- all in an effort to prevent public deception and promote public understanding of the significant concerns and issues surrounding the advertising of products through the use of nonprofits' names and logos.

A number of Attorneys General have undertaken investigations and reached settlements reforming marketing practices arising from commercial-nonprofit alliances; however, recognizing that this marketing phenomenon is expanding rapidly and that issues and concerns raised by this trend transcend the particulars of individual advertising campaigns, the Attorneys General believe that it is desirable to supplement individual law enforcement initiatives with a broader approach.

In February 1998, the Attorneys General wrote to a number of the leading nonprofit organizations, requesting that they assist the Attorneys General's review by providing information about their commercial-nonprofit product advertising policies and practices. After receiving and reviewing responsive information and materials, staff met with a number of nonprofit and other organizations having experience and expertise in the area, including the American Cancer Society, the American Heart Association, the American Lung Association, the American Diabetes Association, the American Dental Association, the Arthritis Foundation and the American Medical Association. Staff of the Attorneys General also met with and received valuable information from the National Health Council, a Washington, D. C. based nonprofit association comprised of more than 100 health related organizations, and IEG, a Chicago based consulting organization and publisher of a newsletter covering and tracking commercial-nonprofit sponsorships.

In addition, staff of the Attorneys General have consulted with experts specializing in business and medical ethics issues, specifically Arthur Caplan, Ph.D. and Mildred Cho, Ph.D., at the Center for Bio-Ethics, University of Pennsylvania Health Systems in Philadelphia, and with an expert on nonprofit management and corporate philanthropy, Peter Frumkin, Ph.D., at Harvard University's John F. Kennedy School of Government. Further, staff reviewed voluntary standards developed by the Council of Better Business Bureaus, Inc. governing joint charitable-corporate marketing programs² as well as various articles from trade publications, journals and popular media.³

The Attorneys General appreciate the cooperation and helpful assistance provided by

all of the groups and persons contacted in the initial fact gathering stage of this multistate process. We believe that the spirit of cooperation shown by the nonprofit organizations with whom we have met reflects a sincere desire to ensure that their promotional practices comply fully with the requirements of governing legal standards and do not mislead or confuse the public.

Following widespread dissemination of this preliminary report, the Attorneys General intend to invite interested nonprofit organizations, consumer groups and for-profit companies to publicly provide their views on both the subject area and the contents of this report. To facilitate this additional valuable input, the Attorneys General intend to hold a public forum on the topic in the near future. Written comments will be solicited and considered as well. After gaining anticipated additional useful information through this process, the Attorneys General plan to issue a final report. The goal of the final report will be to provide to nonprofit organizations and commercial sponsors a better understanding of what state consumer laws require concerning advertising and promotional practices arising from commercial-nonprofit relationships and to increase public understanding about what the use of nonprofits' names and logos in such advertisements really means.

A FEW CAVEATS

A few precautionary notes are appropriate. First, this public report is just that. It is not intended as a statement of rules or guidelines. This report does not have the force of law or constitute a rule or regulation. Rather, it is designed to share information, further public understanding and provide guidance to nonprofit organizations, commercial sponsors and the public. Second, this preliminary report highlights and applies only certain state consumer law principles. Commercial sponsors and nonprofit organizations have independent obligations to comply with all applicable legal standards, including those applicable to nonprofit organizations, not just the consumer law standards discussed in this report. Third, the Attorneys General do not question, and indeed encourage, the significant contributions to public health and welfare long provided by nonprofit organizations, and recognize the need for public and private support of such nonprofit organizations' public services. The Attorneys General are concerned that advertising practices conform to the requirements of state consumer laws and provide truthful, non-deceptive information to the public.

I. BACKGROUND: A GROWING MARKETING TREND

A. The rise of "cause marketing."

One of the earliest examples of the marketing practice typically referred to as "cause marketing" or "cause related marketing" was a 1983 promotion that advertised that for each purchase made with an American Express card, American Express would contribute one penny to the renovation of the Statue of Liberty. The campaign generated contributions of \$1.7 million to the Statue of Liberty restoration project. What would soon capture the attention of marketing departments of major corporations was that the promotion generated approximately a 28% increase in American Express card usage by consumers.⁴

The sales potential and image enhancement lessons reflected in the success of this early marketing example were not lost on American corporations. Major companies have since associated themselves with a wide variety of social issues and have contributed millions of dollars to various causes with which they wish to be associated in the eyes of the consuming public. For example, building on its earlier promotion, American Express conducted a four-year Charge Against Hunger program, which generated approximately \$22 million for a charity addressing poverty and hunger relief. In November 1997, VISA U.S.A., Inc. launched a marketing campaign in which VISA committed to donate, based upon VISA card sales, at least \$1 million to an established children's literacy organization. Visa was building upon an earlier similar literacy campaign ("Read Me A Story") during which card sales increased by an estimated 20%.⁵ Johnson & Johnson has contributed a portion of sales from its children's toiletries products to the World Wildlife Fund. MCI has donated a portion of billings to business owners to the Nature Conservancy or the Audubon Society. Dannon's sponsorship of the National Wildlife Federation has included a tie-in to sales of particular yogurt products. Ralston Purina has conducted marketing campaigns to benefit endangered species. Estee Lauder is associated through its marketing programs with breast cancer research, as is Quaker. Coors Brewing has contributed millions of dollars in funding for literacy organizations and public service ads on literacy. Midas conducted a promotional campaign aimed at women drivers under which consumers who purchased a particular child car seat received a certificate for Midas services worth the purchase price of the car seat. These are only a few of the many examples of the multi-million dollar collaboration that has evolved between corporations and nonprofits involving a broad spectrum of social causes.⁶

This marketing practice of linking a company and its products to an issue or cause in order to improve sales and enhance the corporation's image, while benefiting the designated cause, is generally referred to in marketing circles as "cause related marketing." Other marketing terms for the practice are "passion branding" or "social issues marketing."⁷ Cause marketing has been identified as the fastest growing segment of advertising.⁸ It has been estimated that companies spent approximately \$1 billion on cause related marketing campaigns in 1993, which represented an increase of about 24% from 1992 spending and a 151% increase from 1990.⁹ IEG Sponsorship Report, a Chicago based newsletter and consulting business that tracks corporate sponsorship practices, estimated that total corporate spending in 1998 on sponsorship activities would reach \$6.8 billion. This projected spending includes only payments by corporations to nonprofit sponsors in unrestricted fees in exchange for a marketing affiliation or relationship. A representative of IEG Sponsorship Report informed the states that her firm projected that the value of additional benefits, including advertising and media exposure, for the nonprofit recipients of such sponsorship fees in 1998 would reach a sum approximately three times the amount of the sponsorship fees themselves, or in excess of \$18 billion.¹⁰ IEG Sponsorship Report further estimated that in 1998, businesses would pay various charitable organizations in North America \$535 million for the use of the nonprofits' names in marketing. This figure compares to spending of \$340 million in 1994, \$423 million in 1995 and \$485 million in 1996. Cause marketing is clearly becoming a big business.¹¹

B. The new marketing twist: selling products through the use of nonprofits' names and logos in advertising.

As it evolved from its inception in the early 1980's, typical "cause marketing" has involved tying a charitable contribution by the corporate seller to the consumer's purchase of goods or services. The classic cause marketing pitch essentially consists of: "buy product A and we'll contribute to charity or cause B."

That paradigm in recent years has been supplemented by an increasingly prevalent marketing phenomenon. There is a growing marketplace trend of nonprofit organizations (often health charities) entering into alliances (typically licensing agreements) with commercial sponsors (often within the pharmaceutical industry) under which the nonprofit organization sells the use of its name and logo to the commercial sponsor for use in national advertising campaigns promoting the corporation's commercial products (often, although certainly not exclusively, prescription or OTC drugs). Today's consumers are bombarded with advertisements touting various products, particularly health products, in which a large, familiar and trusted nonprofit's name and logo, often accompanied by a marketing phrase, is prominently featured in the commercial advertisement for a specific product or line of products. Frequently, the licensing agreement allowing the use of the nonprofit's name and logo in marketing the corporate sponsor's products is an exclusive contract, precluding any other manufacturer or product from accessing and using the nonprofit's name and logo.

A few examples will illustrate this developing trend. For instance, full page advertisements in newspapers such as the New York Times and The Wall Street Journal for a prescription cholesterol drug, Pravachol, made by Bristol-Meyers Squibb, prominently display the name and logo of the American Heart Association and provide health information messages about cholesterol and heart disease from the AHA. Under an agreement with the Florida Department of Citrus providing for payment of \$1 million per year to the American Cancer Society, the name and logo of the American Cancer Society has been featured in advertisements, including television advertisements, promoting Florida orange juice. In August 1996, the American Cancer Society entered into a licensing agreement under which it received annual payments of \$1 million in return for allowing SmithKline Beecham Consumer Healthcare the exclusive use of the American Cancer Society's well recognized name and logo in promoting the corporation's over-the-counter smoking cessation aids, NicoDerm CQ (a nicotine patch) and Nicorette (a nicotine gum). As a result, the ACS's name and logo has reached millions of consumers nationwide through advertising messages disseminated in a multimedia campaign. The American Lung Association, in turn, has entered into an agreement with McNeil Consumer Products Company, a subsidiary of Johnson & Johnson, under which the ALA is to receive \$2.5 million annually in return for allowing its name to be used in promoting McNeil's nicotine patch (Nicotrol).¹²

This latest marketing twist is but one form of commercial-nonprofit affiliations. Corporate support of nonprofit organizations manifests itself in different forms and across a wide spectrum of activities, including traditional philanthropic contributions to nonprofits and charitable causes; sponsorships involving corporations providing financial support for a particular fundraising activity or program of a nonprofit organization; commendations (for example, the Arthritis Foundation has extended its commendation and seal of approval for particular product attributes of benefit to arthritis sufferers, such as an easy to open yet secure

container cap for certain OTC pain reliever products); certification programs (for example, the American Heart Association's food certification program for foods meeting certain criteria, such as being low in fat, saturated fat and cholesterol); licensing agreements involving the sale of products or services as those of the nonprofit organization (for example, a cookbook or smoking cessation educational video sold as the nonprofit's own product); and more traditional, transaction based promotional campaigns (the classic cause marketing promotion paradigm described earlier, involving a corporate donation tied to the consumer's purchase of goods or services).

It is important to underscore what this multistate preliminary report is and is not about. This is not a report on cause marketing practices in general or traditional forms of philanthropic giving by corporations. Rather, the report focuses primarily on the emerging marketplace trend of selling and advertising commercial products through the use of nonprofits' names and logos. At the same time, the principles discussed later in this report may provide useful guidance to nonprofit organizations and corporate sponsors regardless of the particular form or type of commercial-nonprofit sponsorship, affiliation or activity.

C. Impact of marketing products through affiliations with nonprofit organizations.

1. Consumer perceptions and choices.

a. Consumers place a high level of trust in nonprofit organizations.

Nonprofit organizations today enjoy a high level of recognition and trust from the public. For example, a survey conducted for the American Cancer Society, based upon telephone interviews with a national sample of 1,011 adults during October 1995, found that, when prompted, virtually all (96%) of consumers surveyed recognized the American Cancer Society. When consumers were asked to rate the American Cancer Society based on several characteristics, the ACS received its highest ratings for its overall reputation and as an organization that people can turn to for accurate information about cancer. 45% of consumers rated the organization a "9" or "10", on a ten point scale, as an organization one can believe in.¹³

Another study reinforces the assumption that this trust in nonprofit organizations is widespread among many consumers. In 1997, the National Health Council published a report, "Americans Talk About Science and Medical News," containing the results of a national survey by Roper Starch Worldwide, Inc., of American adults that was designed "to explore the extent to which Americans pay attention to, trust and act upon medical and health news reported by the media."¹⁴ Part of the study focused on identifying sources of medical and health news that consumers found to be "somewhat" or "completely believable." The study indicated that Americans place a high level of trust in not only certain media sources, but non-media sources as well. Organizations such as the American Cancer Society or the American Diabetes Association were found to be "somewhat" or "completely believable" by 93% of consumers surveyed. This level of trust is comparable to that enjoyed by such health care professionals as doctors (93%), nurses (92%) and pharmacists (92%).¹⁵

Given the hard earned reputations of nonprofit organizations, developed through many

years of providing research, information and services to millions of consumers nationwide, it is hardly surprising that commercial sponsors intent upon differentiating their products in an increasingly competitive marketplace would look to the nonprofit community as a natural bridge toward customer loyalty, corporate image enhancement and increased product sales, as well as an opportunity to support the various charitable causes advanced by nonprofit organizations. Equally unsurprising is that many health charities have received particular attention from the marketing departments of major corporations. Education and health were cited as the top choices for "cause related" marketing programs by executives, with approximately 30% of business executives surveyed favoring those areas.¹⁶ The number of commercial-nonprofit marketing alliances generating national advertising campaigns for health-related products certainly reflects the common theme of corporations increasingly linking with disease prevention voluntary health agencies.

The National Health Council's 1997 commissioned report provides additional insights on the implications of those increasingly frequent linkages in the health care area. While nonprofit organizations received high trust ratings, the study also identified several least believable sources of medical and health news. One such source of medical and health news mentioned in the report were advertisements for medications, with 31% of those surveyed indicating that such advertisements were "not too" or "not at all believable." The report further noted that American consumers age 60 or over are less likely than younger consumers (for example, ages 18-29) to trust advertisements for medications, with 39% of older Americans, versus 27% of younger consumers, saying that such advertisements are "not too" or "not at all believable." The same study noted further that Americans with greater formal education are particularly likely to identify these sources of medical information as having dubious credibility, with 43% of those with graduate degrees expressing the view that drug advertisements are "not too believable", while only 26% of those without a high school diploma express that view.¹⁷ Given the comparatively low levels of trust placed by the public in the marketers of health related products such as prescription and OTC drugs, it is not surprising that such marketers are among the most aggressive in seeking to bolster their marketing messages through partnerships with much more highly regarded nonprofit health organizations. It is open to question, and perhaps the test of time, as to what effect this curious juxtaposition or intermingling, through commercial-nonprofit marketing alliances resulting in advertisements of products including health related goods, of highly credible sources of information with sources that many consumers are skeptical about, will ultimately have upon the overall public trust equation.

b. Consumers prefer products marketed in association with a nonprofit organization.

Cause related advertising has a significant effect on the purchasing decisions of many consumers. Proponents of cause related marketing often cite surveys conducted by Roper Starch Worldwide for a Boston based consulting firm and advocate of cause marketing, Cone Communications. A 1993 Cone/Roper survey of 1,981 consumers found that 66% of consumers polled in the telephone survey stated that they would switch product brands in order to support a cause they care about, assuming the price and quality of the products were equal. 78% of the surveyed consumers stated that they would be more likely to buy a product

associated with a cause of concern to them.¹⁸

A 1997 Cone/Roper Report again showed that cause related marketing can have a significant impact on brand selection. The 1997 survey revealed that when price and quality are equal among competing brands, 76% of surveyed consumers stated that they would be likely to switch from their current product brand to one associated with a good cause. The report indicated that this likelihood of consumers switching brands rose 10 percentage points from the earlier 1993 survey.¹⁹

Another Roper study, commissioned by a Los Angeles advertising and public relations firm, reportedly concluded that one-third of the public frequently bases purchasing decisions on the causes a company supports and 20% of survey respondents stated that they often refused to buy a quality product if they did not like the company selling it.²⁰

Similarly, a study published in 1991 in the Journal of Consumer Marketing measured whether consumers would be willing to switch brands to support a manufacturer that funds charitable causes. 45.6% of the consumers responding to that study's survey indicated that they were somewhat or very likely to switch brands to support a manufacturer that donates to a charitable cause.²¹

Studies conducted for the American Cancer Society also suggest the influence of a nonprofit's name in driving consumer purchasing decisions. For example, a 1994 focus group study commissioned by the American Cancer Society revealed that approximately 74% of consumers agreed that they would be more likely to buy consumer products or services that are associated with a charity such as the American Cancer Society.²² Approximately 70.5% of consumers interviewed in the survey stated that the ACS message and name would increase their loyalty to their most preferred cereal brand, while 40.1% of the survey respondents indicated that they would switch to their second most preferred cereal brand if the ACS logo and message were printed on the package.²³

Research studies commissioned by the ACS revealed similar results with respect to influences of the ACS's name on potential consumer purchasing behavior with respect to other product categories. For example, 71% of surveyed consumers indicated that they would be influenced to consider trying a particular brand of pork and beans if it were promoted with the ACS, while 62% said that they would be likely to purchase the particular pork and bean brand when promoted with the ACS more often than any other brand marketed without the affiliation.²⁴ Similar results for sunscreen and aspirin products, if associated with the ACS, were also shown in the ACS studies.²⁵

c. Consumers believe that products marketed in association with a nonprofit organization carry an endorsement by the nonprofit organization.

Studies conducted for the American Cancer Society confirm the endorsement message implied by the use of a nonprofit's name. One study, involving both consumer focus groups

and interviews with consumers, mentioned concerns regarding the implied endorsement of products, pointed out that "[c]onsumers trust the American Cancer Society and feel that products which carry the ACS logo would have been tested by the ACS," and noted that "[t]he logo as an implied endorsement will draw consumers [sic] (who have an awareness of the ACS) attention to those products."²⁶ Findings from the focus group study included the conclusion that "[w]hen comparing two products equal in characteristics, quality, and price, participants across all groups indicated that they would be likely to select the product 'endorsed' by ACS as opposed to one not so 'endorsed.'"²⁷ The study found that "[i]n general, the use of the ACS logo on any product is considered an 'endorsement' by the ACS by nearly all group participants . . ." and that "[i]n all cases, [focus group] participants emphasized the importance of caution on the part of the charitable organization in selecting a product, to be exercised prior to offering what they believe constitutes a full product endorsement."²⁸

Another study designed to determine public reaction to ACS's involvement in exclusive corporate "cause-related marketing" partnerships, found that "57.3% feel there is an implied endorsement of products using the American Cancer Society name in cause-related marketing."²⁹ The study authors concluded: "Consumers do believe there is some implied endorsement with the society's involvement in CRM [cause-related marketing] . . ."³⁰

In yet another study for the American Cancer Society, measuring public reactions to the 1996 Great American Smokeout event designed to encourage smoking cessation, it was determined that "[t]he main reason why many smokers said that the partnership made them more likely to buy NicoDerm CQ was that ACS's endorsement makes NicoDerm CQ more credible and helps convince them that NicoDerm CQ can help them kick the habit (emphasis in original)."³¹

Similarly, a survey commissioned by the American Heart Association asked consumers about their reaction to products approved by organizations such as the American Heart Association. In that survey, 60% of consumers said they would change brands in order to buy a product approved by the American Heart Association, assuming that the price was the same. The survey also revealed consumer attitudes that might explain in part the reason for this preference. 61% of the respondents assumed that the organization giving approval in some way guarantees the quality of the product, and 88% believed that the product had been tested in some way by the organization.³²

d. Consumers believe that products marketed in association with nonprofit organizations are superior to other competing products.

Many consumers may be led to believe, through use of a familiar nonprofit's name and logo in product advertising, that a product is better or superior to another similar product. Studies conducted for the American Cancer Society suggest that many consumers assume that a product advertised with the American Cancer Society's name will necessarily provide greater health benefits for themselves and their families.

In a November 1994 study commissioned by the American Cancer Society, Michigan Division, the purpose of which was to determine the degree of consumer support for cause

related marketing relationships involving various product categories with the American Cancer Society, 44.5% of consumers agreed or agreed strongly, for example, with the statement, "I believe this brand of cereal promoted with the ACS is more healthy for me and/or my family than any other cereal."³³ 60.4% agreed or agreed strongly with the statement, "I believe eating this cereal will reduce my/my family's risk for cancer."³⁴

Similarly, in a study involving "cause-related marketing" in the aspirin product category, 44% of the consumers interviewed indicated that they believe that a brand of aspirin promoted with the ACS would reduce the risk of cancer more than another aspirin.³⁵ In the study concerning the "food/beans" product category, consumers were asked about the statement, "I believe this brand of pork & beans promoted with the American Cancer Society is more healthy for me and/or my family than any other brand of pork & beans." On a scale of one to ten, with ten indicating total agreement, an agreement level of 6.03 was reached based on consumers' responses. 46.6% of those surveyed agreed or totally agreed with the statement, "I believe this brand of pork & beans promoted with the American Cancer Society is more healthy for me and/or my family than any other brand of pork & beans." A 5.5 agreement level on the same scale was reached with respect to the statement, "I believe eating this brand of pork & beans will reduce my and my family's risk of cancer."³⁶

e. Consumers do not expect marketing relationships between commercial entities and nonprofit organizations to be exclusive and their perceptions of the relationships change when they learn about exclusivity.

The Attorneys General found of interest the results of a telephone survey of consumers conducted for the American Cancer Society to determine how the public feels about the ACS's involvement in exclusive commercial affiliations. The study noted that the ACS has entered into exclusive partnerships that have resulted in nationwide advertising of orange juice products and two OTC smoking cessation products. The study noted as background the ACS's concerns about negative publicity regarding the exclusive nature of the partnerships - "an issue which has not been brought to the attention of consumers through the advertising or promotional campaigns."³⁷

The telephone survey found that 64.7% of the consumers surveyed, when confronted with the fact that the "cause-related marketing" partnerships with companies are exclusive, stated that they did not think that it was appropriate for ACS to form such exclusive relationships. In the telephone surveys, consumers who expressed the view that it was inappropriate for the ACS to form exclusive relationships were then informed that exclusive relationships are necessary to allow for multi-million dollar contributions to fight cancer. After being told this, 53.4% of consumers felt it was somewhat appropriate, 20.5% said it was very appropriate, 14.6% held to the belief that it was somewhat inappropriate and 11.6% felt it was very inappropriate.³⁸

It is interesting that this survey apparently never posed the question whether consumers were aware of the fact that relationships between the American Cancer Society and commercial sponsors were exclusive in nature. Rather, the study apparently presumed lack of awareness, since it recognized that the issue of exclusivity had not been brought to consumers'

attention through the advertising campaigns for the products. It is also interesting that when told that the relationships were exclusive, a majority of consumers (64.7%) expressed the initial view that such exclusive relationships were inappropriate.

In a subsequent study to test how people feel about the American Cancer Society's exclusive partnership involving two smoking cessation aids, only a small minority (8%) of consumers surveyed were aware that the relationship with the corporate sponsor was exclusive in nature. The study further noted, "After people were informed (during the interview) about the exclusive nature of the partnership, their support of the partnerships largely eroded. Many people (47%) felt that the partnership is not an appropriate thing for the ACS to do and almost as many people felt that the partnership detracted from their opinion of the ACS as felt that it enhanced their opinion of the organization." (Emphasis is original.) The study concluded that "if more people knew about the exclusive nature of ACS's 'quit smoking' partnership, they would be less supportive of the partnership program than they are now."³⁹

These results suggest that consumers may well be unaware of the exclusive nature of many commercial-nonprofit marketing relationships yet would find such information important to know in choosing a product. Unfortunately, advertisements touting various products which use nonprofit organizations' names and logos consistently fail to inform the public about the exclusive nature of the underlying arrangement between the corporate sponsor and the nonprofit.

2. Benefits to commercial sponsors and their nonprofit partners.

Leading nonprofit organizations view corporate affiliations as golden opportunities to further the mission of the nonprofit, to leverage the marketing budgets of corporations by obtaining access to mass media resources that the nonprofit could not otherwise afford, to thereby increase public awareness and use of the nonprofit's resources, and to gain an increasingly significant source of revenue.

Commercial sponsors in turn seek through affiliations with nonprofits an opportunity to generate increased sales, enhance the corporation's image as a good corporate citizen, develop long term customer relations, build brand loyalty, and differentiate themselves and their products from other sellers and products in the competitive marketplace. In a survey of business executives, approximately half of the respondents identified increasing sales as a major reason to engage in cause marketing. Other reasons identified by business executives for favoring cause marketing campaigns also fell toward the bottom line: building deeper relationships with customers (cited by 93% of respondents); enhancing corporate image and reputation (89%); and creating and maintaining a compelling corporate purpose (59%).⁴⁰

An observation from one commentator succinctly captures a key corporate consideration behind cause marketing advertising: "Forget the Roper Reports . . . this kind of marketing is easily tracked through sales figures; corporations know it works. If they didn't see an increase in sales, they wouldn't do it."⁴¹

D. Illustrative legal actions involving commercial-nonprofit marketing practices.

A few concrete examples may help both to exemplify the range of concerns raised by advertising products using the name and logo of a recognized nonprofit organization and to illustrate the potential this practice holds for misleading or deceiving consumers. Over the last few years, some commercial-nonprofit product advertising relationships have allegedly run afoul of various legal requirements, triggering investigations by law enforcement agencies, including state Attorneys General and the Federal Trade Commission, as well as private litigation. These cases provide insight into some of the risks and pitfalls that partners in such relationships should avoid.

1. Arthritis Foundation-McNeil Consumer Products Company

In June 1994, McNeil Consumer Products Company, a subsidiary of Johnson & Johnson, and the Arthritis Foundation, a major nonprofit national voluntary health agency, entered into a licensing agreement under which the Arthritis Foundation licensed its name and logo to McNeil for use in marketing four over-the-counter (OTC) analgesic products made by or for McNeil. In return McNeil agreed to pay the Arthritis Foundation a guaranteed \$1 million annually, plus a percentage of royalties, but only if net sales of the products reached high enough levels, which they never did. In October 1994, McNeil and the Arthritis Foundation launched a nationwide multimedia (television, radio, direct mail, in-store promotional) advertising campaign for the four OTC products.

In October 1996, the Attorneys General of nineteen states entered into a settlement agreement⁴² with McNeil and the Arthritis Foundation over the promotion of these products. The Attorneys General alleged that the nationwide advertisements for the products violated state consumer laws for a number of reasons. Early advertisements represented that the products were "new" when the products' active ingredients had long been available on the OTC market and the products were chemically identical to other OTC products with the same active ingredients. The advertisements represented that the Arthritis Foundation "helped to create" the products, when the Arthritis Foundation did not create the products. Advertisements further represented that a portion of each purchase price would go to finding a cure for arthritis, when, in fact, independent of consumers' purchasing decisions, the Arthritis Foundation received from McNeil a guaranteed \$1 million per year plus a percentage of sales if sales reached certain levels, which they did not.

Use of the Arthritis Foundation's name on the packaging of the products and in advertisements implied that the medications came from the Arthritis Foundation while failing to clearly disclose that McNeil made or distributed the products. Certain advertisements represented that the products were "doctor recommended" when none of the products was on the market long enough to be doctor recommended and the advertisements failed to make clear that the "doctor recommended" claim, according to McNeil, referred to the ingredients themselves. Additionally, certain advertisements represented that the products were "especially formulated" when, in fact, their active ingredients were identical to those in other OTC analgesic products.

Under the multistate settlement, McNeil and the Arthritis Foundation agreed that in any future advertising for the products, they would not: advertise that the products are new;

represent that the Arthritis Foundation helped to create the products; represent that a portion of the proceeds from sale of the products goes to arthritis research, without disclosing the financial terms of the agreement between McNeil and the Arthritis Foundation; represent that the products are doctor recommended, unless McNeil and the Arthritis Foundation have substantiation that this claim is true; or represent that the products are "especially formulated"; and that they will disclose that McNeil is the manufacturer or distributor of the products and disclose the active ingredients of the products. The settlement further provided for refunds to consumers upon request, and the payment by McNeil of \$1,960,000 for costs, attorney fees and independent arthritis research.

2. American Medical Association-Sunbeam.

In August 1997, the American Medical Association and the Sunbeam Corporation announced an exclusive, five year agreement under which Sunbeam would pay the A.M.A. royalties tied to product sales in return for use of the A.M.A.'s name in promoting a wide range of Sunbeam products, including such health related products as blood pressure monitors, heating pads, thermometers, humidifiers and vaporizers.⁴³ Under the arrangement the A.M.A. was to be mentioned prominently in Sunbeam's marketing and advertising of the products endorsed or recommended by the A.M.A., the A.M.A.'s seal was to appear in advertising and on product packaging, written health care information from the A.M.A. was to be included inside the packaging of the products and substantial payments in the form of royalties tied to product sales were to be paid by Sunbeam to the A.M.A.⁴⁴

Almost immediately following the announcement of its deal with Sunbeam, the A.M.A. faced a virtual blizzard of public criticism from a variety of sources, including newspaper editorials, consumer health advocates and from within the A.M.A.'s own membership and board of trustees.⁴⁵ Criticism of the arrangement centered on the exclusive nature of the endorsement arrangement, the fact that the A.M.A. apparently had not tested or evaluated any of the products involved and the questions that the arrangement raised about the A.M.A.'s credibility as an independent organization.⁴⁶ Before the planned marketing campaign was implemented, the A.M.A. terminated the arrangement. Sunbeam then filed a lawsuit against the A.M.A., which was settled in July 1998. In the settlement, Sunbeam agreed not to require the A.M.A. to participate in the marketing campaign, and the A.M.A. paid Sunbeam \$9.9 million for damages and expenses.⁴⁷ As part of its defense to Sunbeam's federal court action, the A.M.A. maintained that the agreement was against public policy and would violate state and federal laws prohibiting unfair or deceptive trade practices.⁴⁸

3. American Cancer Society-SmithKline Beecham Consumer Healthcare.

On December 10, 1998, the Attorneys General of twelve states announced a settlement agreement ⁴⁹ with SmithKline Beecham Consumer Healthcare, L.P. (SBCH), arising in part out of a marketing relationship with the American Cancer Society. The settlement provides for significant reforms of national advertising for two OTC smoking cessation aids, which ads featured the name and logo of the American Cancer Society.

In June 1996, SBCH entered into a licensing agreement with the American Cancer

Society, Inc., a nonprofit organization and voluntary health agency recognized by millions of American consumers as having expertise in and being dedicated to the elimination of cancer through research, education and services. The American Cancer Society licensed its name and logo to SBCH for use in promoting the sale of its OTC smoking cessation products, NicoDerm CQ and Nicorette. SBCH agreed to pay the American Cancer Society royalties of \$1 million during the first year of the licensing agreement and certain additional royalties.

The Attorneys General believed that advertisements for SBCH's nicotine patch and nicotine gum, which prominently featured the name and logo of the American Cancer Society and the phrase, "Partners In Helping You Quit," had the tendency and capacity to mislead, deceive and confuse consumers for several reasons, including two reasons relating to the joint promotion of the products.

First, the Attorneys General believed that advertisements featuring the American Cancer Society's name and logo represented that the American Cancer Society had endorsed the advertised products when, in fact, the American Cancer Society had not endorsed either product. Indeed, the American Cancer Society has long maintained a policy against endorsing specific commercial products. Second, SBCH prominently featured the American Cancer Society's name and logo in ads that compared NicoDerm CQ with a competitor's nicotine patch, thereby implying that NicoDerm CQ is more effective in helping consumers stop smoking permanently than the competitor's nicotine patch. In fact, the American Cancer Society never determined that NicoDerm CQ is more effective than or superior to any other nicotine patch, and there are no clinical studies establishing that one nicotine patch is better than another in aiding consumers to stop smoking.

The multistate settlement prohibits SBCH from, among other things, misrepresenting, in any advertisement for any OTC smoking cessation product, that the advertised product has been approved, endorsed or recommended by any organization. Under the settlement, SBCH is required to disclose clearly and conspicuously, in any product advertisements using the name and logo of the American Cancer Society or any third party organization, if applicable, that the organization has entered into an exclusive licensing or other exclusive agreement with SBCH for the use of the organization's name and logo; that SBCH has paid the organization for the use of its name or logo; and that the organization has not endorsed, recommended or approved the advertised product. The settlement further prevents SBCH from using the name or logo of the American Cancer Society in any advertisement that mentions or displays a competitor's product. Additionally, SBCH agreed to pay \$2.5 million under the settlement for attorney fees, costs and independent state smoking cessation initiatives.

The American Cancer Society cooperated fully with the Attorneys General and supported complete and accurate disclosure of the meaning of the use of its name and logo in the advertising of SBCH's smoking cessation products. To its credit, the American Cancer Society, after meetings with the Attorneys General and a careful, deliberative reexamination of its policies, adopted numerous modifications of its policies and practices to guard against inappropriate uses of its name and logo, including disclosure requirements and, as discussed later in this report, abandonment in the future of exclusive marketing alliances.

4. Federal Trade Commission Cases

The Federal Trade Commission has also pursued cases involving deception arising out of marketing relationships between nonprofit organizations and commercial entities. One of these cases involved the American Diabetes Association and the Eskimo Pie Corporation. The FTC challenged advertisements used by the Eskimo Pie Corporation for various frozen dessert products. The advertisements used the name of the American Diabetes Association and its triangular logo, and stated, "Now Eskimo Pie and the American Diabetes Association are partners in providing the pure pleasure of frozen novelties to everyone!" The FTC alleged that through such advertisements, the Eskimo Pie Corporation represented that the American Diabetes Association had approved or endorsed the advertised products when, in fact, it had not done so. The ensuing consent order prohibited the seller from misrepresenting, "through numerical or descriptive terms, logos, symbols, or any other means. . . that such product had been approved, endorsed or recommended by any person, group or organization."⁵⁰

The FTC has challenged false or misleading representations concerning product endorsements and testimonials in a variety of other contexts. In one such case, a seller represented in advertisements for its iron that the product had been endorsed by the National Fire Safety Council and used the Council's seal in product advertisements. The FTC alleged that the advertising claims were false and misleading in that they misrepresented that the Council was an organization with expertise to evaluate and test appliance fire safety and had conferred its exclusive endorsement on the advertised product. The resulting consent order prohibited the seller from representing that any consumer product had been endorsed by any person or organization that is an expert, unless the endorser has the expertise that is represented and the endorsement is supported by an objective and valid evaluation or test.⁵¹

The FTC has obtained a consent order prohibiting an advertiser from misrepresenting that its arthritis treatment was praised by doctors, medical centers and athletic teams, when in fact no medical or athletic organization had provided endorsements for the product.⁵² Similarly, the FTC prohibited the manufacturer of a gas mask from representing that its product was approved by any municipal, state or federal agency unless such advertising claims are true.⁵³ FTC consent orders have barred other advertisers from misrepresenting that their products have been approved, endorsed or recommended by any person, group or organization;⁵⁴ from misrepresenting a pediatrician endorsement of baby food in a survey used by the advertiser;⁵⁵ and from claiming that a cider beverage was approved by the U.S. Dept. of Agriculture.⁵⁶ In another case the FTC alleged that an advertiser of food products misrepresented without significant qualifications that the FDA and the American Diabetes Association had determined that the sweeteners in the seller's foods were beneficial in the diets of consumers who are diabetics. Again, the FTC restricted deceptive representations that the advertiser's foods were accepted or recommended by an individual or organization, other than the advertiser, for use by diabetic consumers.⁵⁷

Additionally, in a case the FTC brought against Colgate-Palmolive Co., the United States Supreme Court made clear that it is deceptive to falsely represent that a product has been endorsed or approved by a person or organization.⁵⁸

These examples are provided merely to illustrate some of the problems that have arisen in advertising campaigns flowing from commercial-nonprofit alliances. The Attorneys' General law enforcement and policy concerns in this area, however, transcend the specifics of individual enforcement initiatives. Clearly, as nonprofit organizations increasingly engage in commercial activities, including marketing their good names for use in the advertising of commercial products in return for payments by commercial sponsors, the traditional lines between nonprofit and for-profit activity become increasingly blurred. One line of clarity and demarcation is provided by the consumer law standards that generally apply to all sellers and advertisers marketing goods or services to consumers, whether in the nonprofit or for-profit sectors. For the guidance of the nonprofit community, commercial entities and the public, the following section of this preliminary report identifies several basic consumer law principles and discusses their application, in the form of guidance principles, to the expanding trend of advertising products through commercial-nonprofit marketing alliances.

II. CONSUMER LAW STANDARDS AND GUIDANCE PRINCIPLES

A. Basic consumer law standards.

A number of well established legal standards and principles under state consumer laws should provide useful guidance to nonprofit organizations, commercial sponsors and the public in this significant public protection area. The following discussion highlights some important basic consumer law standards; however, it hardly constitutes an exhaustive listing or a comprehensive discussion of these selected, basic principles reflected in consumer laws designed to promote honest business practices and truthful advertising.

State consumer laws generally prohibit false advertising, unfair and/or deceptive trade practices and consumer fraud by any person, organization or business advertising or selling goods or services to the public. State consumer protection statutes prohibit representations which are false, or which have the tendency or capacity to mislead or deceive. Consumer laws are paradigm examples of remedial legislation. By legislative intent and drafting, consumer statutes are broadly written in order to capture a wide range of prohibited conduct. Courts have consistently interpreted and applied consumer laws liberally in order to achieve their public protection purposes. Marketing and advertising practices engaged in by commercial sponsors as well as nonprofit organizations are covered by state consumer statutes.

In order to establish violations of state consumer laws it is not necessary to prove that the seller or advertiser acted with intent to deceive the public. Nor is it necessary to prove that consumers have actually been deceived or harmed. Rather, the central question is whether the advertising or conduct at issue has the tendency or capacity to mislead, deceive or confuse the public. An advertisement is viewed in its entirety to determine the net, overall impression conveyed by the advertisement. It is well recognized that consumer laws have been applied to protect both those who are sophisticated and those who may be more naive or gullible to advertising pitches. Advertisers and sellers must recognize that their advertisements reach a broad range of consumers.

State consumer laws cover both affirmative misrepresentations about goods or services

and the failure to disclose material or important facts to the public. Disclosures must be made clearly and conspicuously. "Clearly and conspicuously" means that the disclosure must be of such size, color, contrast and audibility and presented in a manner as to be readily noticed and understood by the consumers to whom the information is being disclosed.

Court decisions applying consumer laws make it clear that both express and implied messages communicated by advertisements can trigger liability for deceptive advertising. Moreover, if an advertisement conveys two or more meanings, one of which is false, misleading or deceptive, then the advertisement itself is false, misleading or deceptive.

Commercial-nonprofit product advertising particularly implicates deception standards dealing with representations of sponsorship, affiliation and approval and representations which constitute endorsements. Some state statutes also prohibit misrepresenting or causing a likelihood of confusion or misunderstanding as to the sponsorship, approval or certification of goods or services; or, causing the likelihood of confusion or misunderstanding concerning the affiliation, connection or association with another person; or, misrepresenting the sponsorship, approval or characteristics of goods or services. These are broad standards. In particular the phrase "causing a likelihood of confusion or misunderstanding" should be carefully considered in the context of commercial-nonprofit marketing, as it fixes substantial responsibility upon the partners in such a relationship for avoiding consumer confusion and misunderstanding about the nature of the relationship.

Consumer laws prohibit sellers from making claims about their products or services without possessing and relying upon, at the time the claims are made, a reasonable basis that supports the claims. If the seller lacks such a reasonable basis, the claims are deceptive. When advertising claims for products or services are scientific in nature and their truthfulness can be established only through scientific evidence, the prior substantiation doctrine requires that the seller possess and rely upon competent and scientific proof for the claims made for the advertised products or services.

Remedies available for violations of consumer laws are, like the statutory proscriptions themselves, both broad and significant. Generally, consumer statutes authorize a court to order injunctive relief stopping or reforming unlawful advertising or marketing practices, award damages or restitution to injured consumers, award the state substantial civil penalties for each violation of the law, and require the defendant to pay the costs and expenses incurred by the state in enforcing the law, including payment of reasonable attorney fees and investigative costs. Additionally, state consumer laws often provide for a private right of action allowing consumers themselves to pursue individual or class actions against violators.

B. Consumer law guidance principles.

1. Both the corporate sponsor and the nonprofit organization engaged in advertising a commercial product must satisfy all applicable legal standards, including consumer laws prohibiting false advertising, unfair and/or deceptive trade practices and consumer fraud.

As mentioned earlier, some call the practice of marketing products through use of a nonprofit's name and logo "cause marketing." Others call it "passion branding" or "issue related marketing." Still others refer to it as being within the compass of a nonprofit's policy on corporate sponsorship, corporate relations, or collaboration with for-profit and other entities. This is the terminology of marketing and public relations. The Attorneys General call this practice what it is - advertising.

In the commercial-nonprofit product advertising area, both the commercial advertiser and the nonprofit partner must obey state consumer laws. The Attorneys' General review has revealed that in most instances, there is close participation and active involvement by both the corporate sponsor and the nonprofit organization in the marketing relationship and in the creation, approval and execution of the advertising campaign.

To safeguard its huge stake in ensuring appropriate use of its name and logo to protect the integrity of its name and reputation, the nonprofit organization typically retains in the agreement with the commercial sponsor the right to review in advance any promotional use of the nonprofit's name and logo. The internal policies of the nonprofit organizations with whom the Attorneys' General staff have met also protect the nonprofit's control over the use of its name and logo. The commercial sponsor, through its marketing department and/or with the assistance of outside advertising agencies, typically develops advertisements, product packaging, labeling and other promotional materials to be used in marketing the sponsor's products. These advertising materials are submitted for review and approval, prior to publication and dissemination, to the nonprofit organization participating in the marketing alliance. Nonprofit organizations typically not only retain the right to review and approve such materials, but actively exercise those rights. By the time the advertising reaches the public, it has been reviewed and approved by the nonprofit organization.

Nonprofits engaging in such marketing alliances have thereby entered the commercial marketplace. They have joined their corporate sponsors in selling products to the American public. Both the commercial sponsor and the nonprofit organization have dual responsibility for complying with applicable legal standards governing the advertising and sale of the product, specifically including the requirements of state consumer laws. Both participants will be legally responsible for any deception that may arise from the advertising campaign. The FTC has also made clear that both the seller and advertiser, as well as the expert endorser, including an organization as expert, may be held liable for misrepresentations or deceptive claims made in an advertisement containing an endorsement.⁵⁹

Holding sellers to their word and furthering legitimate public expectations for truth in advertising makes common sense. That premise is reflected in numerous state enforcement initiatives and public reports. For example, the states have provided guidance concerning car rental marketing practices and environmental benefit ("green") advertising claims.⁶⁰ The same idea is captured in the following observation from an ethics perspective:

Consumers are free to refuse to do business with companies they consider unethical, and support those they view as moral exemplars. As a consequence, representations of companies' social positions and of the social characteristics of their products should be treated comparably to traditional marketing

representations about products and characteristics. Whether products are natural or packaging is recyclable is important to a certain set of consumers. Misrepresentations of social characteristics mislead those consumers into acting inconsistently with important, even cherished, personal values, thereby causing consumer injury in the same manner as a car that fails to live up to manufacturer's [sic] claims about fuel consumption.

Social representations engendered by companies as part of their marketing strategy should be evaluated in the same manner as other 'seller representations.' When coarse misrepresentations are made, for example that containers are recyclable when in fact they are not under the most common usage of the term, then the actions are clearly unethical.⁶¹

As a threshold, starting principle, then, advertising products pursuant to arrangements between a commercial sponsor and a nonprofit organization must, like any other advertising, be truthful, non-deceptive and non-misleading. Just as nonprofit organizations have a compelling, vested interest in protecting the integrity and proper use of their names and logos and preserving public trust in the nonprofit, the responsible commercial sponsor has parallel long term interests in maintaining the relationship with the nonprofit organization, in furthering its sales objectives, in maintaining a positive corporate image and in earning customer trust. Those similar strong underlying interests should drive both the nonprofit organization and the commercial sponsor toward the common destination and obligation of ensuring truthful, non-deceptive advertising and promotional practices. The public deserves no less.

2. Advertisements for commercial products must not misrepresent that a 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.

In joint marketing campaigns reviewed by the Attorneys General, the name and logo of a familiar nonprofit organization is used prominently and extensively in advertising. In many cases, the organization's name and logo also appears on product packaging as well. In both advertising and product packaging, the name and logo is often prominently featured, in close proximity to the brand name being advertised. Typically, no clarifying or qualifying language is used in conjunction with the name and logo of the recognized nonprofit. In other instances, use of the nonprofit's name and logo may be accompanied by marketing phrases that reinforce the endorsement message, such as "Partners In Helping You Quit" (with the American Cancer Society) in advertisements for SmithKline Beecham Consumer Healthcare's smoking cessation aids and "Now Eskimo Pie and the American Diabetes Association are partners in providing the pure pleasure of frozen novelties to everyone!" in frozen dessert advertisements.

There is little question that such advertisements communicate express and implied endorsement messages. These messages are one of the reasons that commercial sponsors enter into these relationships. They help to differentiate the sponsor's products from others in the marketplace and bestow upon those products the benefits of public trust and reputation earned by the nonprofit and embodied in its name and logo.

The research on consumer perceptions of advertising products in association with nonprofit organizations, as discussed earlier, makes it clear that many consumers expect that the nonprofit's name and logo signify that the nonprofit, following testing or evaluation of the product, has determined that the product has satisfied the nonprofit's expert standards or criteria and is therefore worthy of consumers' purchasing support. Indeed, this endorsement message, whether expressed or implied, lies at the core of much of the value to commercial sponsors of commercial-nonprofit marketing. Consumer research clearly shows that commercial-nonprofit joint promotions stimulate consumer purchases because they instill the belief that the sponsor's product has special, differentiating attributes worthy of consumers' time and money.

An important guidepost in this area is the FTC's Guides Concerning Use Of Endorsements And Testimonials In Advertising. Under the FTC Guides an endorsement is defined to include "any advertising message (including any verbal statements, demonstrations, or depictions of the name, signature, likeness or any identifying personal characteristics of an individual or the name or seal of an organization) which message consumers are likely to believe reflects the opinion, beliefs, findings, or experience of a party other than the sponsoring advertiser."⁶² The endorser may be an individual, group or institution.⁶³ A helpful example given by the FTC is a television advertisement for golf balls depicting a prominent and well recognized professional golfer hitting the golf balls: "This would be an endorsement by the golfer even though he makes no verbal statement in the advertisement."⁶⁴ The FTC endorsement guides reflect the principle that consumers rely upon the opinions of endorsers in making decisions about the purchase or use of goods or services. Product endorsements must therefore be non-deceptive.

The FTC Guides also contain standards for expert endorsements by organizations, which are the kinds of endorsement messages most likely to be at issue in the context of commercial-nonprofit promotions. An "expert" is defined by the Guides as any person or organization possessing knowledge on a subject that is superior to the general public's. Endorsers represented, either directly or indirectly, as experts must, of course, possess qualifications sufficient to give them the represented expertise.⁶⁵ An endorsement by an expert, including an expert organization, must be supported by an evaluation or testing of the advertised product at least as extensive as an expert in the particular field would require in order to support claims conveyed in the endorsement. Specifically, "if an organization is presented as being expert, then, in conjunction with a proper exercise of its expertise in evaluating the product . . . , it must utilize an expert or experts recognized as such by the organization or standards previously adopted by the organization and suitable for judging the relevant merits of such products."⁶⁶ The FTC Guides make clear that such endorsements are viewed as representing the judgment of the organization itself. As such, the organization's endorsement must be reached by a process that is sufficient to ensure that the endorsement fairly reflects the collective judgment of the organization.⁶⁷

Surprisingly, despite clear evidence that advertisements using a nonprofit's name to sell products convey endorsement messages to consumers, the Attorneys General have found in their review that nonprofit organizations typically have well settled internal policies

prohibiting endorsements by the organization of particular commercial products. In fact, all of the nonprofit organizations with which the Attorneys' General staff have met have long-established policies and practices against product endorsements. Where the nonprofit has such a policy barring endorsement of commercial products and the nonprofit has not, in fact, endorsed the product, it would be clearly deceptive to represent otherwise through advertisements utilizing the nonprofit's name and logo.

The Attorneys General are deeply concerned about these advertising practices. It is incumbent upon commercial sponsors and nonprofits to ensure advertising flowing from commercial-nonprofit marketing alliances does not misrepresent that the nonprofit has endorsed the advertised product. If it has not done so, then at the very least, a product advertisement that uses a nonprofit's name and logo must clearly and conspicuously disclose that the nonprofit has not endorsed or recommended the product.

The Attorneys General believe that in cases where the nonprofit partner in a commercial - nonprofit promotion has not endorsed the advertised product it is exceedingly difficult to craft an advertisement which does not convey a misleading endorsement message when the advertisement uses the name and logo of a nonprofit organization. Indeed, it is hard to imagine such an advertisement that does not at least convey the message that the nonprofit organization believes the commercial sponsor's product to be a good product. While it may be possible to reduce the impact of such an endorsement message, it is unlikely that any non-specific disclosure will be totally effective in negating the overall endorsement message. Accordingly, we believe that commercial-nonprofit partners should take great care in crafting specific, clear and conspicuous disclosures to dispel the implication of an endorsement in such ads.

3. Advertisements for commercial products using the name or logo of a nonprofit must avoid making express or implied claims that the advertised product is superior, unless the claim is true and substantiated, and the nonprofit has determined the advertised product to be superior. If the nonprofit has not determined the advertised product to be superior, such an advertisement must clearly and conspicuously disclose that fact.

The great potential for deceiving the public through misleading or unsubstantiated superiority claims arises in part from the nature of many commercial-nonprofit marketing affiliations that have been struck in recent years. Pharmaceutical and health care companies marketing a wide range of health products, including prescription and OTC drugs, have increasingly sought marketing relationships with major voluntary health agencies. As a result, health products and major health charities are increasingly being linked in product advertisements reaching millions of consumers throughout the United States.

Independent of whether the advertisement is for a health product or carries a health message, however, commercial-nonprofit product advertisements carry significant potential for deceiving the public through misleading superiority claims. Express or implied superiority claims may arise in at least two contexts. First, an advertisement may expressly mention a competitor's product and represent that the advertised product is superior in terms of

performance, benefits or efficacy to the compared product. Second, an implied superiority claim may arise from the overall net impression of an advertisement using a familiar nonprofit's name or logo, even if another product is not identified in the advertisement. An advertisement which communicates either kind of superiority message will generally be deceptive if the superiority claim is false, if the advertisers do not possess and rely upon at the time the claim is made a reasonable basis for the claim, or if the nonprofit has not actually determined the product to be superior.

Obviously, advertisements which make express comparisons between products are intended by the advertiser to communicate to consumers that the advertised product is superior to competing products. When such ads use a nonprofit's name and logo, they almost always create the impression that the nonprofit group participating in the campaign shares the view that the product is superior. This impression, whether expressed or not, is deceptive unless the nonprofit group has evaluated the product using the procedures required for an expert endorsement by an organization, and the claim is true and substantiated.

Even without direct comparisons to other products, many consumers, as discussed earlier in this report, assume that a product advertised in association with a nonprofit organization is necessarily better than other products in the same category. In fact, the American Cancer Society commissioned studies mentioned earlier reveal that a significant number of consumers believe that various categories of products, if marketed with the ACS's name, would be more effective than others in keeping consumers and their family members from suffering from cancer.

The American Cancer Society research is consistent with common sense. It is entirely reasonable for consumers to believe that a nonprofit organization is going to employ special criteria in determining what products it will back with the power of its name and logo. Given that reasonable belief, it is hardly surprising that such consumers would believe that a product marketed by means of the name and logo of a nonprofit organization is superior to others simply because it was chosen for promotion by the nonprofit over competing products.

To avoid causing confusion or misunderstanding concerning whether a nonprofit participant in a commercial-nonprofit advertising relationship has determined that the product is superior, advertisers should avoid using a nonprofit's name and logo in comparative advertisements directly referring to a competitor's product unless the nonprofit has, employing the appropriate procedures, actually determined the product to be superior and, of course, the claim is substantiated and true. Advertisers should further avoid any implication of superiority in their use of a nonprofit's name and logo in their advertising. Moreover, to dispel the widely held belief that products carrying a nonprofit's name and logo are superior to others, a product advertisement using a nonprofit's name and logo must clearly and conspicuously disclose that the nonprofit has not determined the product to be superior, if that is the case.

4. Advertisements for commercial products using a nonprofit's name and logo shall disclose clearly and conspicuously that the commercial sponsor has paid for the use of the nonprofit's name and logo.

Under the FTC's Guides Concerning Use of Endorsements and Testimonials in Advertising, any "material connection" between the endorser and the advertiser must be disclosed. A fact or relationship that would not reasonably be expected by the consumer and that might materially affect the weight or credibility of the endorsement is required to be disclosed.⁶⁸ The FTC's endorsement guides posit that a connection that is ordinarily expected by viewers and need not be disclosed would be a payment to an endorser who is an expert or well known personality; however, if the endorser is neither represented as an expert nor known to a significant portion of the viewing public, the advertiser should clearly and conspicuously disclose the payment or promise of compensation in exchange for the endorsement.⁶⁹

The Attorneys General believe that the existence of a payment flowing from the commercial sponsor to the nonprofit organization for use of the nonprofit's name and logo is a material fact that must be affirmatively disclosed in advertisements using the nonprofit's name and logo. The Attorneys General believe that this financial connection between the sponsor and the nonprofit would certainly materially affect the weight or credibility of the endorsement message conveyed by use of the nonprofit's name and logo. Money paid to a nonprofit in exchange for use of its name and logo is different from payment to a well known celebrity who receives payment to tout a product in a broadcast commercial. Consumers view and look to nonprofit organizations, particularly health charities, as sources of independent expertise, research, knowledge and services in the area of the nonprofit's mission. Because of the historic role of nonprofit organizations in providing benefits and services for the public good, many consumers would not know or expect that a product advertisement featuring the nonprofit's name and logo resulted from payment for use of the nonprofit's name. Rather, consumers would reasonably expect and assume that a nonprofit organization, historically not in the business of marketing products, would lend its name to a commercial product because of its evaluation and determination as to the quality of that product and its worthiness in being associated with a nonprofit and its mission.

Consumers with this expectation might well change their inclination to buy the product if the fact of compensation were disclosed. In any event, the fact that compensation has been paid would clearly be important to consumers' purchasing decisions. Consumers would not normally expect but would certainly want to know, prior to buying a product advertised with a familiar nonprofit's name and logo prominently associated with the product, that use of the name and the logo had been purchased. This information would be an important key to the consumer's understanding of why the nonprofit's name and logo appears in the advertisement and its significance.

As discussed earlier, disclosure of compensation is a requirement of the multistate agreement with SmithKline Beecham Consumer Healthcare concerning use in OTC smoking cessation product advertising of any organization's name and logo. The same principle should apply regardless of the particular product being advertised through use of a recognized nonprofit organization's name or logo. The Attorneys General perceive no legitimate reason for commercial sponsors or the nonprofit community to withhold this critical information from the public in commercial-nonprofit product advertising. The fact of whether compensation has

been paid for use of the nonprofit's name and logo is material to consumers' purchasing decisions and must therefore be clearly and conspicuously disclosed in product advertisements using the nonprofit's name and logo.

5. Advertisements arising from a corporate-nonprofit arrangement shall not mislead, deceive or confuse the public about the effect of consumers' purchasing decisions on charitable contributions by the consumer or the commercial sponsor.

Commercial-nonprofit advertising of products must avoid misleading or confusing the public about the extent to which consumers will be benefiting a charitable cause through their buying decisions. As mentioned earlier, for example, national advertisements for pain reliever products represented that a portion of each purchase price goes to fund a cure for arthritis. In fact, under the licensing agreement with the manufacturer, the nonprofit organization was guaranteed a fixed annual payment of \$1 million, independent of consumers' purchasing decisions, plus additional royalties if sales reached a certain level, which they did not. As another example, previously broadcast television advertisements for a particular orange juice suggested that consumers' purchase of the advertised product made possible a donation to a nonprofit organization. In fact, under the terms of the licensing agreement with the nonprofit organization, the donation from the sponsor was guaranteed regardless of whether consumers purchased the product or the level of such purchases.

Another example of the potential to mislead the public concerning the effect of their product purchases would arise if the corporate sponsor represented that it would donate a certain percentage of product sales to a designated cause. If the terms of the arrangement between the corporate sponsor and the charitable organization provide for a limitation or cap on the total amount of contributions that will be made during the promotion, it is clearly deceptive and misleading to continue advertising this feature once the cap is reached. If the contribution is also promoted on product packaging or labeling, the product bearing the promotion must not be sold once the cap is reached.

Commercial sponsors and nonprofit organizations involved in commercial-nonprofit marketing alliances may avoid these and similar pitfalls by ensuring that advertisements accurately portray, and do not misrepresent, the actual terms of the arrangement or the true effect consumers' purchasing decisions will have on charitable contributions.

Additionally, disclosure of the amount the commercial sponsor will donate to the nonprofit or charitable cause, or the manner in which the contribution will be calculated (e.g., X cents per purchase or Y percent of product sales) would advance public understanding and help to avoid deceptive practices.

As discussed earlier in this report, the use of a nonprofit's name and logo in product advertisements has a demonstrated, influential effect on consumers' decisions to purchase the advertised product. Consumers who care about particular causes and who are induced to maintain or switch brand allegiance through the use of respected nonprofits' names and logos should receive truthful, nonmisleading information about the real effect of buying the

advertised product. To do otherwise hardly serves the long term interest of the individual commercial sponsor or nonprofit, or the charitable community as a whole, and constitutes a public disservice. On the other hand, truthful advertising about charitable contributions that will be made if the consumer buys the advertised product will positively further the shared interest of the nonprofit organization and the commercial sponsor, and will advance the public interest.

6. Nonprofits should avoid entering into exclusive relationships with commercial sponsors for the marketing of commercial products. In the case where an exclusive arrangement does exist, product advertising using a nonprofit's name or logo shall clearly and conspicuously disclose, if that is the case, that the relationship between the commercial sponsor and the nonprofit is exclusive in nature.

As discussed earlier, the licensing agreements entered into in recent years between major corporations, particularly in the pharmaceutical industry, and leading nonprofit organizations, especially voluntary health agencies, for use of the nonprofit's name and logo have been exclusive in nature. As a result, other manufacturers or sellers are not able to use the nonprofit's name and logo in connection with promoting their competing products. For a number of reasons, the Attorneys General find the practice of exclusivity to be problematic and one that should be avoided by responsible nonprofit organizations contemplating entering into marketing alliances with commercial sponsors.

As shown earlier in this report, many consumers mistakenly assume that a product advertised by a nonprofit organization is necessarily better than other products in the same category. Many consumers may conclude that a product associated with a nonprofit, through use of the nonprofit's name and logo in product advertising, necessarily provides greater health benefits or efficacy than other products not bearing the name and logo of the particular voluntary health agency that is familiar to many members of the public as being an expert in, and devoted to, fighting the particular disease(s) at the core of the voluntary health agency's mission.

If the agreement between a nonprofit organization and a commercial sponsor is exclusive in nature, such claims of superiority that may flow from use of the nonprofit's name and logo in advertising the sponsor's products will likely be reinforced in the minds of many consumers. The Attorneys General believe this to be particularly true in the area of health related products. Consumers may reasonably expect that a recognized nonprofit, particularly a health agency devoted to combating or eliminating a particular disease, would not put its good name and reputation behind one of several products in a given category that may provide health related benefits, unless the nonprofit or voluntary health agency believed the product to be superior to its competitors' products. The Attorneys General believe that few consumers would be aware of, or expect, that the appearance of the nonprofit's name and logo in the product advertising is attributable to an exclusive financial arrangement between the commercial seller of the product and the nonprofit organization. The inherent danger that consumers will believe products marketed by means of the name and logo of a nonprofit organization to be superior to other products is exacerbated by the exclusive nature of many commercial-nonprofit product marketing arrangements.

The messages of superiority conveyed by exclusive marketing relationships are communicated in both advertising and on product packaging. Even if the advertisements for the product do not make express superiority claims, when the product is lined up on a retailer's shelf with a number of similar products, and is the only one which bears the nonprofit's trusted name and logo, then consumers may wrongly conclude the product to be superior.

The facts, as discussed earlier, that most consumers would not reasonably expect such exclusivity in a relationship between a respected nonprofit organization and a commercial seller and that many consumers' views of the relationship itself turn negative once they are aware of the exclusivity feature, suggest a second reason for avoiding such exclusive arrangements.

A third reason that exclusivity in a commercial-nonprofit marketing alliance is troublesome is the effect of such exclusive practices upon competition. When a nonprofit organization sells the use of its name and logo to the highest bidder, policy issues of equal access and fair competition arise. Certain manufacturers of competing products, which may be equally beneficial to those selected by the nonprofit, may not have the resources to access use of the nonprofit's name and logo. Similarly, many nonprofits may not have the financial resources or wherewithal to compete with large national nonprofit organizations whose size and reach make them attractive opportunities for commercial sponsors seeking nonprofit partners for marketing affiliations.

A fourth reason exclusivity should be avoided where a nonprofit's name and logo is to be used in advertising a commercial product lies in the potential to mislead and confuse the public about the nature of the relationship between the commercial sponsor and the nonprofit, and about the significance of the use of the nonprofit's name and logo in advertising. This potential for misleading or confusing the public on those important points is compounded by the existence in the marketplace of certification programs.

Certain nonprofits have developed and implemented over the years certification programs that have historically been nonexclusive in nature. For example, since 1930, the American Dental Association has conducted on a nonexclusive basis a Seal of Acceptance program in which the ADA's seal has been extended to hundreds of products made by different manufacturers, following testing and evaluation of the products to ensure that they meet pre-established criteria or standards for dental products used by the ADA in its independent evaluation process.

Similarly, since 1994 the American Heart Association has developed and implemented a food certification program under which the American Heart Association, following a review, certifies that a product meets certain criteria, such as being low in fat, saturated fat and cholesterol and not having a high sodium content. The food certification program of the AHA is available to any food product manufacturer that applies and pays a fee to the AHA, currently in the amount of \$2,500 per product, with a \$650 per product annual renewal fee. In return, the manufacturer whose food product is certified under the program may use the American Heart Association name, its heart-check certification mark and the statement, "meets

American Heart Association food criteria for saturated fat and cholesterol for healthy people over age two" on the product's packaging. As a result of the AHA's food certification program, the AHA's name and heart-check symbol appear on approximately 700 products made by about 60 different companies.

Consumers familiar with such certification programs may well conclude upon seeing the name of a recognized nonprofit organization in advertising or on product packaging that the nonprofit's name and logo signifies that the product meets general standards or criteria for products in that category. Consumers may also understandably but incorrectly conclude that the absence of the nonprofit's name and logo on competing products means that those products do not meet those standards, when, in fact, the absence of the name and logo from those products is solely the result of an exclusive relationship between the nonprofit and the commercial sponsor. Similarly, many consumers may understandably conclude that the nonprofit's name and logo is openly available to all manufacturers of products who meet established standards. Marketing relationships that are in fact exclusive in nature run contrary to these consumer expectations or understandings. A predictable result of such arrangements is public confusion and misunderstanding concerning the meaning of the nonprofit's name and logo in the context of an exclusive arrangement.

Many representatives of the nonprofit organizations with whom the Attorneys General have met expressed the view that exclusivity was necessary because corporate sponsors value an exclusive relationship as a means of achieving the objective of product differentiation. Under this view, exclusivity is required in order for the nonprofit to access the financial support provided by the corporate sponsor, who may not be interested in pursuing the relationship with a nonprofit if other manufacturers have the same access to the nonprofit's name and logo.

The Attorneys General find this reasoning unpersuasive for several reasons. It is questionable whether exclusivity is a necessary precondition for commercial-nonprofit alliances. The certification programs that have existed for a number of years and have operated on a nonexclusive basis undermine the necessity rationale. Similarly, the recent experience of the American Cancer Society is instructive. The ACS had entered into exclusive relationships with product sponsors, including an exclusive relationship with SmithKline Beecham Consumer Healthcare for the promotion of two OTC smoking cessation products. Following input from many Attorneys General and extensive reevaluation of its policies, the ACS changed its policies so that the organization will no longer enter into such exclusive marketing relationships in the future. After adopting this change, SBCH renewed and continued its relationship with ACS pursuant to the ACS's changed policies. Similarly, an internal task force recently recommended that the American Heart Association eliminate exclusive corporate promotional relationships.

More fundamentally, the Attorneys General find unpersuasive an argument that a practice with the potential to mislead or confuse the public is required as a business necessity. If accepted, such logic would permit quite a broad range of conduct, including unlawful conduct, provided that it satisfied the financial interests of those who engaged in the conduct. Clearly, this is an unacceptable rationale for perpetuating exclusivity in agreements struck

between a commercial sponsor and a nonprofit organization that result in misleading product advertising using the nonprofit's name and logo.

For these reasons, the Attorneys General urge nonprofit organizations and commercial sponsors to avoid entering into exclusive product advertising relationships. While the Attorneys General recognize that there is a strong desire, particularly on the part of commercial sponsors, that their nonprofit marketing relationships be exclusive, the potential for deception arising from exclusive relationships is great. The Attorneys General believe that commercial-nonprofit product advertisers should avoid exclusivity in their relationships.

With respect to existing exclusive arrangements or any that nevertheless may be adopted in the future, any resulting product advertisement utilizing the nonprofit's name and logo must clearly and conspicuously disclose that the relationship is exclusive in nature. Failure to disclose such important information that would naturally affect a consumer's decision to purchase the advertised product constitutes deception by omission. Clear and conspicuous disclosure of exclusivity, when applicable, should help to avoid misleading consumers into believing that use of the nonprofit's name and logo is generally available to products in the same category meeting certain criteria, and should help address the corollary deception of representing, through use of the nonprofit's name and logo, that the advertised product is superior to others in the same class of products. Such disclosure, particularly when combined with disclosure of the existence of a payment by the commercial sponsor to the nonprofit for use of the latter's name and logo, are important steps toward educating consumers about the meaning and significance of the advertising use of the nonprofit's familiar name and logo.

III. POLICY CONCERNS

There is little room to question that public trust is the true currency supporting nonprofit organizations. Each and every nonprofit that the Attorneys' General staff have met with have identified their names and reputations as being their central and greatest asset. Public trust is at the heart of the nonprofit community. Safeguarding the confidence and trust placed in nonprofit organizations necessarily serves as a bedrock objective. The Attorneys General urge nonprofit organizations to continue to focus on that pivotal policy consideration when determining whether, and how, to enter into any marketing alliance with a corporation that involves promotion of a commercial product.

The Attorneys General believe that careful consideration should be given to the potential impact on nonprofit organizations' independence that marketing alliances offering substantial payments to nonprofit organizations in exchange for use of their names and logos may have. Although such arrangements are essentially commercial transactions, there may be helpful lessons to be found in literature examining the effect of the provision of payments and gifts in creating implicit obligations on the part of the recipient to reciprocate in the relationship. For example, literature in the medical field is replete with discussions of the impact of gift-giving and financial incentives provided by the pharmaceutical industry to physicians. Repeated concerns have been raised about the potential influence of such practices on the prescribing habits of physicians. In 1991 the Office of Inspector General, in a report

entitled "Promotion of Prescription Drugs Through Payments and Gifts," reviewed extensive literature analyzing the effect of pharmaceutical promotional efforts on physician prescribing practices, including studies which either found such an effect or focused on potential conflicts arising from such practices.⁷⁰ Commentators have argued that the very act of providing a gift creates an obligation on the part of the physician to prescribe the sponsoring drug company's product.⁷¹ This view is premised on the perspective that inherent in the gift-giving relationship is an obligation on behalf of the recipient to respond to the gift, creating an implicit obligatory relationship between donor and recipient.⁷² Additionally, concerns in this area also include the appearance of impropriety arising from such pharmaceutical industry-health care relationships and the potential damage to the public's confidence in the medical profession that may result from such practices.⁷³

Just as the medical profession is based upon public trust and confidence, the relationship between the nonprofit community, the public which it serves through the provision of a variety of services and the donor community are all held together by the glue of public trust. To maintain that trust, nonprofit organizations, including those contemplating or engaging in marketing alliances with commercial sponsors, need to preserve their independence and maintain practices and policies anchored in that public trust foundation.

The Attorneys General are concerned, from a policy perspective, about whether and the extent to which nonprofit organizations will be able to maintain their integrity and independence, in both actual fact and public perception, should the trend of commercial-nonprofit marketing alliances continue to develop in the marketplace. As previously mentioned, the Attorneys General believe that many consumers understandably view nonprofit organizations, particularly voluntary health agencies whose central missions are disease prevention and cure and the promotion of public health, to be independent, unbiased, neutral sources of expertise, information and services within the area of the nonprofit's specialized mission. Nonprofit organizations have traditionally provided, and continue to provide a broad range of services and benefits to the public, including research, referrals, education and advocacy. The Attorneys General understand that many voluntary health agencies, while continuing to provide such services, may be moving away from the area of direct provision of health services and increasingly emphasizing their roles as advocates for consumers with particular diseases or health conditions in supporting needed changes in the health care system. It would appear essential for nonprofit organizations, including voluntary health agencies, to maintain their actual and perceived independence and integrity in order to best further the interests of the public that they serve.

Indeed, the high level of public trust and confidence nonprofit organizations enjoy today is perhaps best understood and traceable to the original purposes of nonprofit and charitable organizations. The core historical purpose of nonprofit organizations is to benefit society. Public benefit is the reason many nonprofit and charitable organizations exist. Charities are provided preferential treatment, including tax exemptions, precisely because they are organized to provide benefits to society. As the United States Supreme Court has noted:

Charitable exemptions are justified on the basis that the exempt entity confers a public benefit - a benefit

which the society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues. . . The institution's purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred.⁷⁴

In other words, society confers upon nonprofit organizations, including charities, such special privileges as tax exemptions in return for the performance of services providing socially desirable objectives which benefit the community.⁷⁵

Public trust thus provides an appropriate ending to this preliminary report, just as it should provide the starting point policy consideration for both nonprofit organizations and commercial sponsors in this area of significant public interest and importance.

CONCLUSION

The participating Attorneys General hope that this preliminary public report will promote the goals of working cooperatively with non-profit and for-profit organizations to ensure that product advertising utilizing the name and logo of nonprofit organizations is truthful and nondeceptive, that consumers receive the full, accurate information and disclosures needed to make informed purchasing decisions and that the advertising and marketing practices that are the subject of this report not only satisfy the threshold requirements of consumer laws but are consistent with the high standards of public trust and confidence placed in nonprofit organizations. The Attorneys General recognize that those objectives are both shared by and are beneficial for the nonprofit and for-profit organizations involved and, most importantly, for consumers in each of the participating states and nationwide.

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¹ Throughout this report the terms "Attorneys General" and "States" include the Corporation Counsel of the District of Columbia.

² "Application of the CBBB Standards for Charitable Solicitations to Joint Charitable/Corporate Marketing Ventures," Council of Better Business Bureaus, Inc., Philanthropic Advisory Service (Sept. 2, 1988); and "CBBB Standards for Charitable Solicitations," Council of Better Business Bureaus, Inc., Philanthropic Advisory Service. See also "Shopping for a Cause - Business Marketing that Benefits Charities," "Give . . . But Give Wisely," Quarterly Newsletter, Council of Better Business Bureaus, Inc. (Spring 1997).

³ A computerized search for literature relating to "cause marketing" during the past five years revealed over 75 articles on the subject, including the following illustrative articles: James T. Bennett and Thomas J. DiLorenzo, "Health Charities: Reputation for Sale?" Consumers Research, Jy. 1997, at 10; Thomas A. Fogarty, "Corporations uses causes for effect," USA Today, Nov., 10, 1997, at 7b; John Davidson, "Cancer Sells," WorkingWoman, v. 22, no. 5, May, 1997, at 36; Thomas W. Dunfee, "Marketing an ethical stance," Financial Post, Nov. 2, 1996, at S16; J. Gregory Dees, "Enterprising Non-Profits," Harv. Bus. Rev., Jan.- Feb., 1998, at 55; Julie Liesse, "Line between

public service, paid ads blurs," Advertising Age, v. 61, no. 42, Oct. 8, 1990, at 28; Scott M. Smith and David S. Alcorn, "Cause Marketing: A New Direction in the Marketing of Corporate Responsibility," J. of Consumer Marketing, v. 8, no. 3, Summer 1991, at 19; Marian Burros, "Endorsements Raise Money and Questions," N.Y. Times, Oct. 22, 1997, at F3; Stan L. Friedman, Charity, Know Thy Corporate Partner - and Thyself," Chronicle of Philanthropy, Oct. 30, 1997 (opinion letter); Cyndee Miller, "Tapping into women's issues is potent way to reach market," Marketing News, v. 27, no. 25, Dec. 6, 1993, at 1; "Are Good Causes Good Marketing," Business Week, Mar. 21, 1994, at 64; Mickey Meece, "Consumers Like 'Cause Marketing,' Survey Finds," American Banker, v. 159, no. 109, at 13; Tom Weisen, "Cone - Commissioned Survey Verify Cause Marketing," Adweek, Dec. 13, 1993; "Execs View Cause Marketing as a Way to Build Relationships," Marketing News, v. 30, no. 18, Aug. 26, 1996, at 6; "Profitable Partnerships: Consumers Support Cause Marketing," Research Alert, Je. 3, 1994; "Two Studies Point to Even Wider Support for Cause Marketing," Entertainment Marketing Letter, v. 10, no. 9, Sept., 1997, at 6; "Bad Taste: Crossing the Line," Phoenix Gazette, Jy. 16, 1994, at b14 (editorial); James K. Glassman, "American Express Charges Ahead With 'Cause' Marketing," Wash. Post, Dec. 24, 1993; Howard Schlossberg, "Members Only to include homeless in cause marketing," Marketing News, v. 26, Jy. 20, 1992, at 6; Francy Blackwood, "Cause Marketing Puts Spirit of Giving into Buying," S.F. Bus. Times, Nov. 14, 1997, at 4A; Betsy Spethmann, "Cause Celebre," Promo, Feb., 1998, at 31; "Consumers' Receptivity to Cause Marketing Grows Again," Research Alert, Jan. 3, 1997, at 7; John Bissell, "Cause marketing takes on new look," Brandweek, Aug. 19, 1996, at 14; "If Cause Marketing is a Win/Win Situation, Why Don't More Entertainment Marketers Plug-in?" Entertainment Marketing Letter, Apr. 1996, at 1; Stan Friedman and Charles Kouns, "Reinventing Cause Marketing," Brandweek, Oct. 27, 1997, at 17; Howard Schlossberg, "Causes Give Way to Issues and Passion," Promo, Feb., 1994, at 40; "Just Cause," Sportstyle, Oct. 1996, at 18; Nancy Arnott, "Marketing with a passion," Sales & Marketing Management, Jan., 1994, at 64; Shelly Donald Coolidge, "Cause Marketing: Companies Look Beyond the Bottom Line," Christian Science Monitor, Mar. 7, 1994, at 9; Bonnie Baber, "Sole-searching: As More Footwear Firms Seek Partnerships with Organized Charities, are Company and Cause Always Compatible?" Footwear News, May 19, 1997, at S4; James Tenser, "Supplier Backing Sought for Cause Marketing," Supermarket News, Mar. 29, 1993, at 15; and Maggie Jackson, "Marketing With a Cause," Peoria Journal Star, Dec. 30, 1997, at B4.

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6 See John Davidson, "Cancer Sells," WorkingWoman, May, 1997; Thomas A. Fogarty, "Corporations Use Causes for Effect," USA Today, Nov. 10, 1997, at 7B; and Francy Blackwood, "Cause marketing puts spirit of giving into buying," S.F. Bus. Times, Nov. 14, 1997, at 4A.

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¹⁶ "Execs. view cause marketing as a way to build relationships," Marketing News, v. 30, no. 18, Aug. 26, 1996, at 6.

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²³ Id. at 5.

²⁴ American Cancer Society Caused-Related Marketing Product Category Analysis, Michelson & Associates, Inc. (August 1996), at 3.

²⁵ American Cancer Society Caused-Related Marketing Product Category Analysis, Michelson & Associates, Inc. (February 1996); American Caused-Related Marketing Research Report 1994, Michelson & Associates, Inc. (Mall Intercept Survey).

²⁶ American Cancer Society Cause-Related Marketing Research Report, Michelson & Assoc., Inc. (1994), at 5.

²⁷ Id. at 12.

²⁸ Id. at 10.

²⁹ American Cancer Society Cause-Related Marketing Exclusivity Consumer Survey, Michelson & Assoc., Inc., at 3.

³⁰ Id. at 5.

³¹ A Study of Public Reactions to the 1996 Great American Smokeout and the Partnership Between ACS and Nicoderm CQ, Lieberman Research Inc., for the American Cancer Society (Dec. 1996), at 6.

³² Carol Drakos, American Heart Assoc. Internal Memorandum, Market Research Summaries (Mar. 3, 1995), at 1.

³³ Cause-Related Marketing Product Category Analysis - Cereals, Michelson & Assoc., Inc., App.

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³⁵ Cause-Related Marketing Product Category Analysis - Aspirin, Michelson & Assoc., Inc., at 3.

³⁶ Cause-Related Marketing Product Category Analysis - Food/Beans, Michelson & Assoc., Inc., at 32; and App.,

14.

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