

## NOTE

### Pink Profiteers: Cause-Related Marketing and the Exploitation of Consumers' Consciences

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#### ABSTRACT

*Cause-related marketing ("CRM") is a method of advertising that links the purchase of a product to a charitable donation. CRM has become increasingly popular in the last decade, likely because market research has shown that a large majority of consumers prefer cause-marketed products over non-cause-marketed products of comparable price and quality. One of the most prominent examples of CRM in today's marketplace is pink ribbon products, sold in support of the fight against breast cancer.*

*CRM, however, is regulated inadequately, and too many CRM claims mislead consumers regarding their purchase's donative impact. This Note argues that such CRM claims are deceptive within the meaning of the Federal Trade Commission Act and that the Commission should adopt guidelines for the use of CRM. These guidelines would instruct marketers to make clear and conspicuous disclosures to consumers in order to equip consumers with the knowledge necessary to make informed purchasing decisions.*

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## INTRODUCTION

Cathy Consumer goes to her local supermarket on her weekly grocery run.<sup>1</sup> Perusing the dairy aisle, she stops when she reaches the yogurt, one of Cathy's favorite healthy snacks. Cathy does not prefer a particular brand; she usually purchases whatever strikes her fancy while shopping. Today, Yoplait catches her eye, but not because of the flavor, the nutrition facts, or the price. Yoplait yogurt lids bear a pink ribbon, which Cathy knows symbolizes the fight against breast cancer, along with the slogan "Save Lids to Save Lives." Upon seeing these special labels, Cathy recalls an ad she had seen on television recently in which a famous actress urged viewers to buy Yoplait and send their lids back to the company, because the company would do-

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<sup>1</sup> This hypothetical is loosely based on information derived from an investigation of General Mills and Yoplait described in Press Release, Cathy Cox, Ga. Sec'y of State, Secretary Cox: Agreement with General Mills to Conclude Investigation into Yoplait Charitable Promotion Results in Additional \$63,000 for Breast Cancer Research (Dec. 21, 1999), available at <http://sos.georgia.gov/pressrel/pr991221.htm>.

nate fifty cents per lid to breast cancer research. Sure enough, the label on the yogurt carton reiterates the pledge of fifty cents per lid.

Cathy's mind is made up. She knows that breast cancer is a devastating disease that kills thousands of women in the United States every year—a staggering 40,589 women in 2008.<sup>2</sup> She is also grateful for her own health and good fortune in life, and she likes to contribute to charitable causes at every opportunity she encounters. She buys ten cartons of Yoplait yogurt, satisfied that her purchase will result in a five-dollar donation to breast cancer research.

Cathy Consumer represents the millions of consumers who choose pink ribbon products and other merchandise promoted using cause-related marketing (“CRM”), the commercial practice of marketing products on the basis of their association with a social cause or charity.<sup>3</sup> Those consumers who purchased Yoplait yogurt during its “Save Lids to Save Lives” campaign in 1999, however, did so perhaps in vain.<sup>4</sup> Although consumers nationwide returned 9.4 million lids—which, based on the fifty-cents-per-lid promise, would merit a \$4.7 million contribution to breast cancer research—General Mills, Yoplait's parent company, had predetermined that it would donate a maximum of \$100,000.<sup>5</sup> Thus, after the first 200,000 lids were returned and the maximum donation reached, millions of consumers may have chosen Yoplait over other brands with false hopes of contributing to the fight against breast cancer.<sup>6</sup>

Fortunately, by November 2010, Yoplait's “Save Lids to Save Lives” campaign was conspicuously disclosing its maximum donation amount, one much higher than its meager \$100,000 in 1999.<sup>7</sup> But because pink ribbon marketing and CRM in general have proven so lucrative, the number of products employing such marketing tactics has multiplied beyond measure, and, hence, so have the opportunities for consumer deception. For instance, research has shown that CRM campaigns frequently use vague, even deceptive ways of characteriz-

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2 CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., *United States Cancer Statistics: An Interactive Atlas*, [http://apps.nccd.cdc.gov/DCPC\\_INCA/DCPC\\_INCA.aspx](http://apps.nccd.cdc.gov/DCPC_INCA/DCPC_INCA.aspx) (select “death count” as “cancer event” and “Female Breast” as “Site”) (last visited Nov. 4, 2012).

3 Berglind & Nakata, *Cause-Related Marketing: More Buck than Bang?*, 48 BUS. HORIZONS 443, 443 (2005).

4 See Press Release, Cathy Cox, *supra* note 1.

5 *Id.*

6 See *id.*

7 See Deborah L. Jacobs, *Disclosure Runs Into 140-Character Limits*, N.Y. TIMES, Nov. 10, 2010, <http://www.nytimes.com/2010/11/11/giving/11CAUSE.html>.

ing the relationship between the product and the cause, often misleading consumers to believe that their purchases contribute more to charity than they actually do.<sup>8</sup> This Note argues that such deception exploits both social causes and consumers' good hearts and that the current scheme of consumer protection laws and enforcement mechanisms does not adequately prevent and punish deceptive CRM practices. This Note also asserts that certain prevalent CRM practices constitute "unfair or deceptive acts or practices in or affecting commerce," in violation of Section 5 of the Federal Trade Commission ("FTC") Act,<sup>9</sup> and proposes FTC guidelines to inform companies of required CRM disclosures.

Part I provides context for the above arguments and proposals by discussing the history of CRM, its impact on the American marketplace, and its critics in the fields of social and political activism. In addition, Part I discusses the findings of market researchers, who have investigated consumer understanding of CRM claims through empirical studies. Part II shifts focus to the law's inadequate regulation of this growing marketing practice. It summarizes the laws currently applicable to CRM and makes the case for FTC regulation under Section 5 of the FTC Act. Part III offers a picture of what such FTC regulation might look like, setting forth guidelines modeled after the FTC Guides and Trade Practice Rules, with some influence from the Better Business Bureau Standards for Charity Accountability. Finally, Parts IV and V address potential counterarguments to new CRM regulation and further bolster this Note's proposal by showing that the suggested guidelines withstand criticism.

## I. CRM 101

Although pink ribbon marketing is perhaps the most conspicuous—indeed, ubiquitous—form of CRM today, the origins of CRM emerged long before any breast cancer awareness movement. This Part examines the factors that led to the proliferation of CRM as well as CRM's positive and negative effects on the consumer experience.

### A. *The Rise of CRM*

Since the days of capitalist legends John D. Rockefeller and Andrew Carnegie, philanthropy has remained a significant part of the American corporate tradition.<sup>10</sup> A century passed, however, before

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<sup>8</sup> See *infra* notes 65–73 and accompanying text.

<sup>9</sup> Federal Trade Commission (FTC) Act § 5, 15 U.S.C. § 45(a) (2006).

<sup>10</sup> Berglind & Nakata, *supra* note 3, at 445. Carnegie and Rockefeller, two of the wealthi-

companies discovered how strategic philanthropy could better serve their bottom line. In 1983, American Express launched its campaign to aid the Statue of Liberty Restoration project.<sup>11</sup> In a six million dollar advertising operation, the company trumpeted to the public that it would donate one cent for each use of its credit card and one dollar for each new card issued to the renovation of America's iconic monument.<sup>12</sup> The campaign was a huge success: it raised over one million dollars for the cause, and it sparked a twenty-eight percent increase in American Express card usage and a seventeen percent increase in card applications.<sup>13</sup> These results translated into millions of dollars in profit for the company, making its expensive ad campaign well worthwhile.<sup>14</sup> American Express thus coined the term "cause-related marketing" to describe its inventive selling strategy.<sup>15</sup>

Both the term and the strategy stuck. Between 1983 and 2003, corporate spending on CRM campaigns surged from nearly zero to \$922 million, and it continues to rise.<sup>16</sup> CRM is now a familiar part of the American consumer experience, with such recognizable examples as Paul Newman's "Newman's Own" products benefiting progressive charities;<sup>17</sup> participation by the Gap, Apple, and other brands in the (PRODUCT)RED campaign for AIDS relief in Africa; and, of course, thousands of "pink ribbon" products that support the fight against breast cancer.<sup>18</sup>

### B. Praise for CRM

Some commentators believe that CRM is a win-win-win: for companies, the nonprofit organizations with whom companies affiliate for CRM initiatives, and society as a whole.<sup>19</sup> The benefits to companies

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est businessmen of the nineteenth century, notoriously donated millions of dollars to fund a number of this country's libraries and universities, as well as other philanthropic projects. Joyce Appleby, Op-Ed., *Philanthropy, Not Bonuses*, L.A. TIMES, Dec. 6, 2009, at A42.

<sup>11</sup> Edward B. Chansky, *For Goodness Sake: Legal Regulation and Best Practices in the Field of Cause Marketing*, CAUSE MARKETING FORUM, <http://www.causemarketingforum.com/site/apps/nlnet/content2.aspx?c=bkLUKcOTLkK4E&b=6415417&ct=8951489> (last visited Nov. 4, 2012).

<sup>12</sup> Berglind & Nakata, *supra* note 3, at 445.

<sup>13</sup> *See id.*

<sup>14</sup> *See id.* at 447.

<sup>15</sup> *See id.* at 445.

<sup>16</sup> *See id.*

<sup>17</sup> *See About Us*, NEWMAN'S OWN FOUND., <http://newmansownfoundation.org/about-us> (last visited Dec. 21, 2012).

<sup>18</sup> Chansky, *supra* note 11.

<sup>19</sup> *See* Sue Adkins, *Cause-Related Marketing: Who Cares Wins*, in *THE MARKETING BOOK* 669, 669 (Michael J. Baker ed., 5th ed. 2003); Berglind & Nakata, *supra* note 3, at 444, 447-49;

are obvious: CRM is good business.<sup>20</sup> It can increase sales, secure customer loyalty, and cultivate general goodwill toward a company.<sup>21</sup> One consumer study found that eighty-four percent of Americans “would be likely to switch brands to one associated with a good cause, if price and quality are similar.”<sup>22</sup>

CRM’s capacity to attract the attention of consumers renders it a powerful vehicle for promoting a nonprofit organization’s message and for fundraising, thus benefitting resource-bereft nonprofits as well.<sup>23</sup> In 2002, the Olympic Games and the United States Olympic Committee received \$860 million from the CRM efforts of over sixty-four companies, including McDonald’s and Coca-Cola.<sup>24</sup> In 2005, Susan G. Komen for the Cure (“Komen Foundation” or “Komen”), a powerful and often controversial<sup>25</sup> foundation for breast cancer education and research,<sup>26</sup> raised thirty-five million dollars as a result of its CRM corporate partnerships.<sup>27</sup> In 2011, the Komen Foundation expected that figure to reach fifty million dollars.<sup>28</sup>

Komen, a hefty brand in itself, perhaps epitomizes the nonprofit organization’s availment of CRM for the gain of the cause. With its lucrative Races for the Cure, Komen depends on CRM less for fundraising and more for message promotion.<sup>29</sup> In fact, Komen is largely responsible for transforming the image of breast cancer from a neglected and stigmatized women’s issue into a topic on the national and global agenda garnering the emotions, donations, and political sup-

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Sarah Dadush, *Profiting in (RED): The Need for Enhanced Transparency in Cause-Related Marketing*, 42 N.Y.U. J. INT’L L. & POL. 1269, 1303–04 (2010); Chansky, *supra* note 11.

<sup>20</sup> Berglind & Nakata, *supra* note 3, at 447; Chansky, *supra* note 11.

<sup>21</sup> See Berglind & Nakata, *supra* note 3, at 444, 447–48; *Statistics Every Cause Marketer Should Know*, CAUSE MARKETING FORUM, [http://www.causemarketingforum.com/site/c.bkLUKcOTLkK4E/b.6448131/k.262B/Statistics\\_Every\\_Cause\\_Marketer\\_Should\\_Know.htm](http://www.causemarketingforum.com/site/c.bkLUKcOTLkK4E/b.6448131/k.262B/Statistics_Every_Cause_Marketer_Should_Know.htm) (last visited Nov. 4, 2012).

<sup>22</sup> Paul N. Bloom et al., *How Social-Cause Marketing Affects Consumer Perceptions*, 47 MIT SLOAN MGMT. REV. 49, 51 (2006).

<sup>23</sup> Berglind & Nakata, *supra* note 3, at 448.

<sup>24</sup> *Id.*

<sup>25</sup> See, e.g., Karen McVeigh, *Susan G. Komen’s ‘Pinkwashing’ a Black Mark on Charity*, THE GUARDIAN (Feb. 15, 2012, 1:06 PM), <http://www.guardian.co.uk/world/2012/feb/15/komen-pinkwashing-problem-planned-parenthood?newsfeed=true>.

<sup>26</sup> *About Us*, SUSAN G. KOMEN FOR THE CURE, <http://ww5.komen.org/AboutUs/AboutUs.html> (last visited Nov. 4, 2012).

<sup>27</sup> Tara Parker-Pope, *How to Tell if a Pink-Ribbon Product Really Helps Breast-Cancer Efforts*, WALL ST. J., Oct. 10, 2006, at D1; Natasha Singer, *Welcome, Fans, to the Pinking of America*, N.Y. TIMES, Oct. 16, 2011, at BU1.

<sup>28</sup> Singer, *supra* note 27.

<sup>29</sup> See Parker-Pope, *supra* note 27. See generally Singer, *supra* note 27.

port of anyone with a mother, grandmother, sister, or daughter.<sup>30</sup> Komen is also responsible for entrenching the otherwise arguable view that early mammography is the best strategy for fighting the disease.<sup>31</sup> The Foundation's success in promulgating its message is a result of its market-driven business model. "America is built on consumerism," Nancy Brinker, Komen's founder, has said.<sup>32</sup> "To say we shouldn't use it to solve the social ills that confront us doesn't make sense to me."<sup>33</sup>

The argument that CRM benefits consumers and society as a whole, also espoused by Brinker, draws on the same theme. Brinker has called the movement she leads the "democratization of a disease."<sup>34</sup> While few have the means to be a philanthropist of the likes of Oprah Winfrey or Bill Gates, everyone is a consumer. CRM, by tying ordinary activities like grocery shopping to philanthropy, engages segments of the population typically excluded from \$200-per-plate fundraisers in charitable giving.<sup>35</sup> For some consumers, purchasing products that benefit a cause they care about can become an accessible way of practicing altruism.<sup>36</sup>

For other consumers, purchasing cause-marketed products provides an outlet for political activism or rebellion. These consumers take care that their spending decisions reflect and promote their social and political values.<sup>37</sup> For example, they might view corporate America as greedy and corrupt and support companies engaged in CRM campaigns "to reinforce that good behavior."<sup>38</sup> A former president of (PRODUCT)RED, a CRM operation partnering brands like Gap and Apple with the Global Fund to Fight AIDS, captured the rebellious spirit of this political and ethical consumerism:

We use the word "punk rock capitalism." There are some people who want to march on Washington or 10 Downing Street, and other people who just aren't that politically active and engaged. Red provides a very immediate empowering

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<sup>30</sup> See SAMANTHA KING, PINK RIBBONS, INC.: BREAST CANCER AND THE POLITICS OF PHILANTHROPY vii, xix, 1-2, 14 (2006).

<sup>31</sup> Singer, *supra* note 27.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> See Berglind & Nakata, *supra* note 3, at 450; see also Deborah J. Webb & Lois A. Mohr, *A Typology of Consumer Responses to Cause-Related Marketing: From Skeptics to Socially Concerned*, 17 J. PUB. POL'Y & MARKETING 226, 235 (1998).

<sup>36</sup> See Webb & Mohr, *supra* note 35, at 235.

<sup>37</sup> See Dadush, *supra* note 19, at 1307.

<sup>38</sup> See Webb & Mohr, *supra* note 35, at 235.

mechanism for someone to do something quite revolutionary, to cause a big corporation to break off a portion of its profit and put it towards a huge social challenge.<sup>39</sup>

Casting CRM as a savvy appropriation by charity of corporate resources and as an opportunity for grassroots consumer expression, the views of Nancy Brinker and (PRODUCT)<sup>RED</sup>'s president receive copious criticism. Many CRM critics contend that corporate goals overwhelm the charitable goals, leaving CRM vulnerable to abuse.

### C. *Criticism of CRM*

Criticism of CRM generally falls into one of two categories. Arguments in the first category strike at the very essence of CRM, concluding that CRM causes more harm than good and that the only solution is to eliminate CRM from available marketing tactics. Arguments in the second category assume the continuing vitality of CRM, but they take issue with CRM forms and identify potential abuse.

#### 1. *Criticism of CRM's Essence*

Much criticism of CRM reflects discomfort with CRM's "marriage of strange bedfellows": profit-seeking corporations and profit-renouncing charities.<sup>40</sup> First, and perhaps most troubling to CRM critics, CRM invites corporations, and their self-interested incentives, to wield considerable influence in the pursuit of a particular cause.<sup>41</sup> Such influence permits corporations to manipulate the conversation surrounding the cause to serve their own interests.<sup>42</sup>

In the fight against breast cancer, this has manifested in the advocacy of breast cancer screening and the advancement of breast cancer treatment, to the exclusion of investigation into environmental factors that cause the disease.<sup>43</sup> Not coincidentally, corporations that have a stake in the issue are prominent donors to breast cancer charities through CRM campaigns. Examples include cosmetics companies such as Avon, which hosts popular Walks for Breast Cancer across the United States and internationally, and Estee Lauder, credited as the originator of the iconic pink ribbon.<sup>44</sup> Despite these companies' high-

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<sup>39</sup> Dadush, *supra* note 19, at 1304.

<sup>40</sup> See Berglind & Nakata, *supra* note 3, at 449.

<sup>41</sup> See *id.*

<sup>42</sup> See *id.*

<sup>43</sup> See *id.*

<sup>44</sup> See KING, *supra* note 30, at xxiv–xxv, 27; Breast Cancer Action, *Cosmetics: Philanthropy or Hypocrisy?*, THINK BEFORE YOU PINK, [http://thinkbeforeyoupink.org/?page\\_id=15](http://thinkbeforeyoupink.org/?page_id=15) (last visited Nov. 4, 2012).



profile support for the breast cancer movement, they sell products containing parabens and phthalates, additives in makeups and lotions speculated to have links to breast cancer.<sup>45</sup> Similarly, BMW and Ford partner with Komen for their respective Ultimate Drive and Warriors in Pink campaigns.<sup>46</sup> Their automobiles, however—like all automobiles, no matter the manufacturer—produce air pollutants called polycyclic aromatic hydrocarbons, which some link to the causes of breast cancer.<sup>47</sup> Finally, Yoplait, another Komen partner, promises to make a donation for every pink yogurt lid redeemed; meanwhile, its yogurt is made using dairy stimulated with rBGH, a carcinogenic bovine growth hormone.<sup>48</sup>

While appearing philanthropic, these companies have incentives to steer their donated funds away from breast cancer research that would harm their sales.<sup>49</sup> Avon's offer to fund research by the Babylon Breast Cancer Coalition (the "Coalition") with money raised from its cause-marketed products provides a troubling example. Because the Coalition's research examined environmental causes of breast cancer, Avon conditioned its offer on the Coalition's agreement to refrain from criticizing Avon.<sup>50</sup> With such corporate strings attached, research efforts can hardly yield a complete and objective examination of breast cancer risk factors.

Consistent with companies' ultimate concern for their bottom line, their chosen causes with which to affiliate for CRM purposes are typically those that are devoid of controversy and that pull the greatest number of consumer heartstrings. More simply put, CRM spotlights causes that are marketable and ignores causes that are unmarketable.<sup>51</sup> Breast cancer, for one, especially after Komen's im-

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<sup>45</sup> Breast Cancer Action, *supra* note 44; *see also* KING, *supra* note 30, at 26. Some studies have detected traces of parabens in breast tumors and have compared certain properties of parabens to those of estrogen, which is believed to play a role in breast cancer formation. U.S. FOOD & DRUG ADMIN., *Cosmetics*, <http://www.fda.gov/cosmetics/productandingredientsafety/selectedcosmeticingredients/ucm128042.htm> (last updated June 21, 2011). The FDA, however, discredits aspects of those studies and has concluded that the levels of parabens used in cosmetics are well within the range of safety. *Id.*

<sup>46</sup> KING, *supra* note 30, at 24; *Partners & Sponsors: Ford Motor Company*, SUSAN G. KOMEN FOR THE CURE, <http://ww5.komen.org/Partners/FordDivision.aspx> (last visited Nov. 4, 2012).

<sup>47</sup> Breast Cancer Action, *Clean Cars*, THINK BEFORE YOU PINK, [http://thinkbeforeyoupink.org/?page\\_id=17](http://thinkbeforeyoupink.org/?page_id=17) (last visited Nov. 4, 2012).

<sup>48</sup> Breast Cancer Action, *Yoplait: Put a Lid on It*, THINK BEFORE YOU PINK, [http://thinkbeforeyoupink.org/?page\\_id=10](http://thinkbeforeyoupink.org/?page_id=10) (last visited Nov. 4, 2012).

<sup>49</sup> *See* Berglind & Nakata, *supra* note 3, at 449.

<sup>50</sup> KING, *supra* note 30, at 27.

<sup>51</sup> Berglind & Nakata, *supra* note 3, at 451; Dadush, *supra* note 19, at 1310–11.

age revamp, has been called “the darling of corporate America” because of its association with femininity and nurture, resonant especially for female consumers and perfectly amenable to pretty pink merchandise.<sup>52</sup> Also, unlike AIDS, for example, breast cancer carries no connotation of intravenous drug use or sexual activity that might alienate some consumers.<sup>53</sup> On the other hand, (PRODUCT)<sup>RED</sup> has succeeded in making AIDS marketable by benefiting women and children who are victims of the disease in Africa and by receiving Bono’s celebrity endorsement.<sup>54</sup> According to critics of CRM’s essence, the unfortunate result of CRM’s need for marketable charities is the exclusion of worthy, yet somehow off-putting causes from a lucrative fundraising opportunity.<sup>55</sup>

Finally, critics argue that CRM amounts to corporate exploitation of human suffering, of nonprofit CRM partners, and of consumers’ charitable orientations, for financial gain.<sup>56</sup> Breast Cancer Action (“BCA”), a watchdog organization, has shed light on such CRM abuses in the breast cancer context and has run a counter-campaign called “Think Before You Pink.”<sup>57</sup> It urges consumers to question the amount of money from CRM campaigns actually channeled to breast cancer research and treatment, which it says is often quite trivial in comparison to the amount spent on advertising or reaped as profit.<sup>58</sup> Consumers would do better, BCA argues, to simply donate directly to the charity.<sup>59</sup>

## 2. Criticism of CRM’s Form

Like BCA and other critics of CRM’s essence, critics of CRM’s form are also concerned with consumers’ knowledge of the donation versus profit comparison, but instead of condemning CRM altogether, they focus on equipping consumers with the information necessary to

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<sup>52</sup> Lisa Belkin, *Charity Begins at . . . The Marketing Meeting, The Gala Event, The Product Tie-In: How Breast Cancer Became This Year’s Cause*, N.Y. TIMES, Dec. 22, 1996, at SM40.

<sup>53</sup> *Id.*

<sup>54</sup> Dadush, *supra* note 19, at 1311.

<sup>55</sup> *Id.* Consumers are unlikely to encounter a CRM claim, for example, that promises to donate a dollar for every purchase to recovering heroin addicts.

<sup>56</sup> See Berglind & Nakata, *supra* note 3, at 449.

<sup>57</sup> See *About Us*, THINK BEFORE YOU PINK, [http://thinkbeforeyoupink.org/?page\\_id=12](http://thinkbeforeyoupink.org/?page_id=12) (last visited Nov. 4, 2012).

<sup>58</sup> Breast Cancer Action, *Who’s Really Cleaning Up?*, THINK BEFORE YOU PINK, [http://thinkbeforeyoupink.org/?page\\_id=21](http://thinkbeforeyoupink.org/?page_id=21) (last visited Nov. 4, 2012); see also KING, *supra* note 30, at 24.

<sup>59</sup> Breast Cancer Action, *Before You Buy Pink*, THINK BEFORE YOU PINK, [http://thinkbeforeyoupink.org/?page\\_id=13](http://thinkbeforeyoupink.org/?page_id=13) (last visited Nov. 4, 2012).

make educated purchasing choices.<sup>60</sup> Often, some of that vital information is missing from CRM claims. For example, although some CRM campaigns disclose the amount donated to charity, others do not, perhaps stating merely that “a portion of the proceeds” will benefit the cause.<sup>61</sup> In fact, a study conducted in 2003 found that seventy percent of the surveyed CRM offers promoted on the internet used quantifiers describing donation amount that were “completely abstract in nature,” such as a “portion of the sales” or a “percentage of the proceeds.”<sup>62</sup> That study also reported that subjects interpreted such vague quantifiers to connote a wide range of amounts.<sup>63</sup> Specifically for the term “portion,” donation estimates varied between \$0 and \$25 for a hypothetical \$49.98 product and between \$0 and \$300 for a hypothetical \$499.98 product.<sup>64</sup> Illuminating the significance of this variance, the study further concluded that the perceived donation amount affects a consumer’s choice between a cause-marketed product and a comparable, non-cause-marketed product.<sup>65</sup> These results suggest that consumers seeking to support charity with their purchases are confused, if not deceived, when transparency regarding the actual amount donated is missing from CRM campaigns.<sup>66</sup>

Even when an accurate, more concrete quantifier is used to describe donation amount, however, consumers may still misperceive the impact of their purchase on the cause. Research has demonstrated that such misperception—generally an overestimation of donation amount—occurs when donation amount was expressed in terms of a correct, numeric percentage of “the profit” (e.g., for a five-dollar product, “ten percent of the profit from each purchase will be donated to breast cancer research”).<sup>67</sup> In fact, even consumers with formal accounting training shared this tendency for misperception.<sup>68</sup> The same research found that consumers’ estimates of donation amount were comparatively more accurate when, instead, donation amount was expressed in terms of a dollar amount from the purchase

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<sup>60</sup> See, e.g., John W. Pracejus et al., *On the Prevalence and Impact of Vague Quantifiers in the Advertising of Cause-Related Marketing (CRM)*, 32 J. ADVERTISING 19, 26 (2003) (exposing the need for unambiguous CRM information to avoid consumer confusion).

<sup>61</sup> See *id.*

<sup>62</sup> See *id.* at 22.

<sup>63</sup> See *id.* at 24.

<sup>64</sup> See *id.*

<sup>65</sup> See *id.* at 25–26.

<sup>66</sup> See *id.* at 26.

<sup>67</sup> G. Douglas Olsen et al., *When Profit Equals Price: Consumer Confusion About Donation Amounts in Cause-Related Marketing*, 22 J. PUB. POL’Y & MARKETING 170, 171 (2003).

<sup>68</sup> See *id.*

price (e.g., for a five-dollar product, “one dollar will be donated to breast cancer research for each product purchased”).<sup>69</sup>

In addition to vague quantifiers, undisclosed minimum or maximum donations—like the \$100,000 cap on donations in Yoplait’s 1999 “Save Lids to Save Lives” campaign—invoke criticism for giving consumers a false impression of the amount donated as a result of their purchase.<sup>70</sup> Each consumer who bought a carton of Yoplait yogurt in 1999, for example, expected that his or her purchase and subsequent lid redemption would contribute fifty cents to breast cancer research.<sup>71</sup> Because of the \$100,000 cap, however, whether that expectation proved true depended upon whether his or her lid was one of the first 200,000 lids redeemed, which fully exhausted the maximum donation.<sup>72</sup> Those consumers who purchased Yoplait and redeemed one of the first 200,000 lids benefited the charity at the expected fifty-cent-per-lid rate.<sup>73</sup> The consumer who purchased Yoplait and returned lid number 200,001 or higher, on the other hand, contributed nothing to the charity.<sup>74</sup> A guaranteed minimum donation similarly skews consumer expectations when the minimum exceeds the aggregate per-purchase donations.<sup>75</sup> Like the consumer who purchases a cause-marketed product after aggregate per-purchase donations surpassed the maximum, a consumer who purchases a cause-marketed product when aggregate per-purchase donations fail to reach the minimum contributes nothing to the cause.<sup>76</sup>

Like the specific donation amount per purchase, the particular charitable organization to which donations are given is sometimes absent from CRM advertisements. For example, Penn markets pink tennis balls with a claim that fifteen cents per can is donated to nonspecific “breast cancer research.”<sup>77</sup> Where the money goes matters for several reasons. First, according to BCA and other critics of breast cancer corporatism, much of the money raised from CRM campaigns goes to organizations that, at best, support unfruitful projects, and at worst, are complicit in preventing examination of environmen-

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<sup>69</sup> See *id.* at 180.

<sup>70</sup> See Chansky, *supra* note 11; Press Release, Cathy Cox, *supra* note 1.

<sup>71</sup> See Press Release, Cathy Cox, *supra* note 1.

<sup>72</sup> See *id.*

<sup>73</sup> See *id.*

<sup>74</sup> See *id.*

<sup>75</sup> See Chansky, *supra* note 11.

<sup>76</sup> *Id.*

<sup>77</sup> *Penn Pink Ball*, PENN, <http://www.pennracquet.com/sites/usenglish/pinkball.html> (last visited Nov. 4, 2012); see also Breast Cancer Action, *supra* note 59 (explaining need to determine what breast cancer programs get money donated from purchase of a product).

tal causes of breast cancer.<sup>78</sup> Komen receives the brunt of this criticism.<sup>79</sup> Komen, however, at least sets strict standards for its corporate partners, requiring certain disclosures and significant donations.<sup>80</sup> A second reason why specification of the donation's destination matters is that other charities are not so conscientious.<sup>81</sup> One extreme example is the Coalition Against Breast Cancer, which directed less than four percent of its \$9.1 million in donations from the past five years toward breast cancer research and used the remaining millions for expenses such as the founders' cell phone bills and exorbitant salaries for the charity's officers.<sup>82</sup> When CRM campaigns fail to indicate the beneficiaries of their donations, consumers risk choosing a product in the name of a bogus charity, whereas disclosure allows caring consumers to scrutinize the charity's bona fides before making the decision to purchase.<sup>83</sup>

In the case of the Coalition Against Breast Cancer, the Attorney General for the State of New York took legal action against the charity and its for-profit fundraisers under the state's charitable solicitation statute.<sup>84</sup> Consumer protection law, however, in both the federal and state contexts, offers little comfort to consumers of cause-marketed products who wish to have complete information regarding which organization will receive the donation resulting from their purchase as well as the precise amount of that donation.

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<sup>78</sup> See Breast Cancer Action, *supra* note 59; Gayle Sulik, *Tracking the Big "K,"* PINKRIBBONBLUES.ORG (Oct. 24, 2011), <http://pinkribbonblues.org/2011/10/tracking-the-big-k/> [hereinafter Sulik, *Tracking the Big "K"*]; see also Gayle Sulik, *Industry Ties to Nonprofits,* PINKRIBBONBLUES.ORG (Oct. 21, 2011), <http://pinkribbonblues.org/2011/10/20-industry-ties-to-nonprofits/> [hereinafter Sulik, *Industry Ties to Nonprofits*] (explaining potential conflicts of interest when certain corporations make donations to nonprofits).

<sup>79</sup> See, e.g., Sulik, *Industry Ties to Nonprofits*, *supra* note 78; Sulik, *Tracking the Big "K,"* *supra* note 78.

<sup>80</sup> See *Corporate Partnership Fact Sheet*, SUSAN G. KOMEN FOR THE CURE (2010), <http://ww5.komen.org/uploadedFiles/Content/Partners/BecomeOne/AttachFactSheet2010-2011updated.pdf>; Amy Westervelt, *The Pinkwashing Debate: Empty Criticism or Serious Liability?*, FORBES (Nov. 4, 2011, 4:39 PM), <http://www.forbes.com/sites/amywestervelt/2011/11/04/the-pinkwashing-debate-empty-criticism-or-serious-liability/>.

<sup>81</sup> See Lea Goldman, *The Big Business of Breast Cancer*, MARIE CLAIRE, Oct. 2011, at 157–58.

<sup>82</sup> Bryan Cohen, *Schneiderman Says Breast Cancer Charity Funneled Donations*, LEGALNEWSLINE.COM (June 28, 2011 9:50 AM), <http://www.legalnewsline.com/news/233145-schneiderman-says-breast-cancer-charity-funneled-donations>; Michelle Nichols, *New York Sues Breast Cancer Charities Over Donations*, REUTERS (June 28, 2011, 4:18 PM), <http://www.reuters.com/article/2011/06/28/us-usa-cancer-newyork-idUSTRE75R6PT20110628>.

<sup>83</sup> See Tim Ogden, *Starring Cause Marketing Campaigns*, PHILANTHROPY ACTION (Oct. 8, 2010), [http://www.philanthropyaction.com/nc/starring\\_cause\\_marketing\\_campaigns/](http://www.philanthropyaction.com/nc/starring_cause_marketing_campaigns/).

<sup>84</sup> Nichols, *supra* note 82.

## II. THE LEGAL FOUNDATION

Criticism of CRM's essence—regarding corporate influence on, for example, breast cancer research, and the conflicts of interest associated with that influence—suggests that the law should prohibit companies with a stake in the cause from using CRM at all. This Note, however, takes a less extreme approach. As demonstrated by partnerships like Komen and Ford or the Babylon Breast Cancer Coalition and Avon, many charities either do not view their corporate relationships as conflicts of interest or have decided that their interest in corporate funding outweighs any harm due to corporate bias.<sup>85</sup> Especially because government bodies charged with identifying and regulating carcinogens have determined that products like Ford's or Avon's do not pose health risks,<sup>86</sup> the law should not foreclose charities and companies from forming partnerships in which they see mutual benefit and perhaps have a right to engage.<sup>87</sup> For now, the problems with CRM's essence are best left to social and political activists.

CRM's potential for consumer deception, on the other hand, is a problem suited for a legal solution. First, rather than imposing a complete ban on CRM regardless of those who find it ultimately beneficial, consumer protection law aims to fully inform consumers so they can decide for themselves whether a company's relationship with a charity is reason enough to purchase a product. Second, the foundation of consumer protection law already in place provides a convenient starting place for reform. This Part summarizes this current legal framework and highlights its deficiencies in protecting against CRM abuse.

### A. *Federal Trade Commission Act*

Comprising the entirety of federal statutory law on this subject is Section 5 of the FTC Act, which provides that "unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."<sup>88</sup> The FTC, the agency responsible for enforcing the FTC Act,<sup>89</sup>

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<sup>85</sup> See *supra* notes 43–48 and accompanying text; see also Westervelt, *supra* note 80 (discussing the process through which several charities select their corporate partners).

<sup>86</sup> See Breast Cancer Action, *supra* note 44; see also DEPT. OF HEALTH & HUMAN SERVS., PUBLIC HEALTH STATEMENT: POLYCYCLIC AROMATIC HYDROCARBONS (1995) (summarizing health effects of Polycyclic Aromatic Hydrocarbons, a chemical compound commonly present in engine exhaust).

<sup>87</sup> See *infra* Part IV.

<sup>88</sup> 15 U.S.C. § 45(a) (2006).

<sup>89</sup> *Id.* § 45(b).

has supplemented Section 5's brief, nonspecific language with interpretive rules and policy statements. The FTC, as well as the federal courts, regards "unfair acts or practices" as distinct from "deceptive acts or practices,"<sup>90</sup> and accordingly, the FTC has promulgated both a *Policy Statement on Unfairness*<sup>91</sup> ("Unfairness Statement") and a *Policy Statement on Deception*<sup>92</sup> ("Deception Statement").

The FTC's consumer unfairness jurisdiction covers a broad spectrum of corporate conduct. According to the Unfairness Statement, whether an act or practice is "unfair" depends on three factors, cited with approval by the Supreme Court in *FTC v. Sperry & Hutchinson Co.*<sup>93</sup>: "(1) whether the practice injures consumers; (2) whether it violates established public policy; [and] (3) whether it is unethical or unscrupulous."<sup>94</sup> Since the FTC's promulgation of its Unfairness Statement, Congress has amended Section 5 to codify these factors and to add further requirements for the designation of unfair practices by the FTC: the act or practice must cause or be likely to cause "substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."<sup>95</sup> In 2003, for example, the FTC applied these standards and alleged that America Online's continued billing of customers despite their requests to cancel its services was "unfair" within the meaning of the section 5 of the FTC Act.<sup>96</sup>

The FTC's consumer deception jurisdiction focuses more narrowly on advertising. In identifying a deceptive practice, the FTC first determines what claims the advertisement conveys, both express and implied.<sup>97</sup> Then, it evaluates the claims according to the standards for deception set forth in the Deception Statement<sup>98</sup>: a "representation, omission or practice" is "deceptive" if (1) it is likely to mislead a con-

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<sup>90</sup> *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1367 (11th Cir. 1988), *cert. denied*, 488 U.S. 1041 (1989).

<sup>91</sup> Letter from the Fed. Trade Comm'n to Senator Wendell H. Ford and Senator John C. Danforth, Senate Comm. on Commerce, Science & Transp. (Dec. 17, 1980) [hereinafter Unfairness Statement], *reprinted in* Int'l Harvester Co., 104 F.T.C. 949 app. at 1070-72 (1984).

<sup>92</sup> Letter from the Fed. Trade Comm'n to Representative John D. Dingell, Chairman, House Comm. on Energy & Commerce (Oct. 14, 1983), *reprinted in* Cliffdale Assocs., Inc., 103 F.T.C. 110 app. at 174 (1984) [hereinafter Deception Statement].

<sup>93</sup> *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239, 244 n.5 (1972).

<sup>94</sup> Unfairness Statement, *supra* note 91, at 1072; *see also Sperry & Hutchinson Co.*, 405 U.S. at 239, 244 n.5.

<sup>95</sup> 15 U.S.C. § 45(n) (2006).

<sup>96</sup> *See* Press Release, Fed. Trade Comm'n, AOL and Compuserve Settle FTC Charges of Unfair Practice (Sept. 23, 2003), <http://www.ftc.gov/opa/2003/09/aol.shtm>.

<sup>97</sup> *See* *Stouffer Foods Corp.*, 118 F.T.C. 746, 799 (1994).

<sup>98</sup> *See id.* at 776.

sumer acting reasonably under the circumstances; and (2) it is material—that is, it is likely to affect consumers’ conduct or decisions with respect to the product at issue.<sup>99</sup> The Second, Seventh, Ninth, and D.C. Circuit Courts of Appeals, as well as several district courts, have employed this FTC policy as a three-part test in determining whether an advertising or marketing practice violates section 5 of the FTC Act, asking “(1) what claims are conveyed in the ad; (2) are those claims false or misleading; and (3) are those claims material to prospective consumers?”<sup>100</sup>

The FTC Guides and Trade Practice Rules<sup>101</sup> provide a lengthy yet nonexhaustive, noncomprehensive, and nonbinding description of practices, including advertising and marketing practices, that the FTC interprets as unfair or deceptive.<sup>102</sup> Although the guides are technically not binding law—they are merely the FTC’s interpretation of the law—“[f]ailure to comply with the guides may result in corrective action by the commission under applicable statutory provisions.”<sup>103</sup>

For example, at part 260, the FTC sets forth Guides for the Use of Environmental Marketing Claims, known, for short, as the “Green Guides.”<sup>104</sup> Among the Green Guides’ “General Principles” is that “[a]n environmental marketing claim should not be presented in a manner that overstates the environmental attribute or benefit, expressly or by implication. Marketers should avoid implications of significant environmental benefits if the benefit is in fact negligible.”<sup>105</sup> To facilitate application of such principles, the Green Guides provide sample situations in which a principle may or may not apply. For instance, “Example 1” under the principle regarding overstatement of environmental benefits describes the following situation:

A package is labeled, “50% more recycled content than before.” The manufacturer increased the recycled content of

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<sup>99</sup> Deception Statement, *supra* note 92, at 175.

<sup>100</sup> *Kraft, Inc. v. FTC*, 970 F.2d 311, 314 (7th Cir. 1992); *see also* *FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006); *FTC v. Verity Int’l, Ltd.*, 443 F.3d 48, 63 (2d Cir. 2006); *Novartis Corp. v. FTC*, 223 F.3d 783, 786 (D.C. Cir. 2000); *FTC v. Patriot Alcohol Testers, Inc.*, 798 F. Supp. 851, 855 (D. Mass. 1992); *In re Am. Family Enters.*, 256 B.R. 377, 433 (D.N.J. 1992); *FTC v. Nat’l Bus. Consultants, Inc.*, 781 F. Supp. 1136, 1142 (E.D. La. 1991).

<sup>101</sup> 16 C.F.R. pts. 17–260 (2012).

<sup>102</sup> 16 C.F.R. pt. 17.

<sup>103</sup> *Id.*

<sup>104</sup> 16 C.F.R. § 260.1–260.8; *see also* Joseph J. Swartz, Comment, *Thinking Green or Scheming Green?: How and Why the FTC Green Guide Revisions Should Address Corporate Claims of Environmental Sustainability*, 18 PENN. ST. ENVTL. L. REV. 95, 96 (2009) (“In 1992, the FTC issued Environmental Guides, often referred to as the Green Guides . . .”).

<sup>105</sup> 16 C.F.R. § 260.6(c).



its package from 2 percent recycled material to 3 percent recycled material. Although the claim is technically true, it is likely to convey the false impression that the advertiser has increased significantly the use of recycled material.<sup>106</sup>

The Green Guides also address the circumstances under which a product or its packaging may bear the label “environmentally friendly,” “recyclable,” or similar potentially deceptive terms, among other environmental marketing issues.<sup>107</sup>

Another section of FTC Guides and Trade Practice Rules potentially applicable to CRM claims is the Guides Concerning Use of Endorsements and Testimonials in Advertising.<sup>108</sup> Endorsements are sometimes relevant to CRM because a company’s representation of its affiliation with a nonprofit organization may falsely suggest that the organization endorses the company’s product. The case of *Eskimo Pie Corp.*<sup>109</sup> illustrates this kind of false representation. In marketing its “Sugar Freedom” ice cream products, the company claimed to be “proud partners” with the American Diabetes Association (“ADA”).<sup>110</sup> According to the FTC, Eskimo Pie’s use of the ADA’s name and logo implied that the ADA endorsed the products, when, in fact, the ADA merely sold the rights to its name and logo in an effort to raise funds for its fight against Type 2 Diabetes.<sup>111</sup>

Just as it did in the Eskimo Pie example, if the FTC has “reason to believe” that a party “is violating, or is about to violate” Section 5, it may exercise its enforcement authority.<sup>112</sup> With this authority, the FTC may petition a federal district court to enjoin the violation, or it may conduct its own administrative proceedings.<sup>113</sup> Such administrative proceedings may take the form of rulemaking or adjudication.<sup>114</sup> If the FTC pursues rulemaking, the FTC Act authorizes it to establish “rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce” within the meaning of Section 5.<sup>115</sup> For example, one such rule declares,

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.* § 260.7.

<sup>108</sup> 16 C.F.R. pt. 255.

<sup>109</sup> *Eskimo Pie Corp.*, 120 F.T.C. 312 (1995).

<sup>110</sup> *See id.* at 313–14.

<sup>111</sup> *See* Marc Santora, *In Diabetes Fight, Raising Cash and Keeping Trust*, N.Y. TIMES, NOV. 25, 2006, at A1.

<sup>112</sup> 15 U.S.C. §§ 45(b), 57a (2006).

<sup>113</sup> *See id.* §§ 45(b), 53(b).

<sup>114</sup> *See id.* §§ 45(b), 57a.

<sup>115</sup> *Id.* § 57a(a)(1)(B).

In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for a funeral provider to: (i) Represent that state or local law requires that a deceased person be embalmed when such is not the case; (ii) Fail to disclose that embalming is not required by law except in certain special cases, if any.<sup>116</sup>

When the FTC opts for adjudication, on the other hand, the matter may be resolved in one of two ways. First, the FTC and the regulated company may enter a consent agreement, in which the company settles with the FTC without admitting liability, and, after opportunity for public comment, the agreement becomes final in a consent order.<sup>117</sup> Second, if no settlement is reached, an administrative law judge resolves the matter by either directing the company to cease and desist unlawful conduct or dismissing the FTC's complaint.<sup>118</sup>

The FTC's single foray into the field of CRM ended in a consent order.<sup>119</sup> In 1996, Benckiser Consumer Products—now Reckitt Benckiser, a marketer primarily of household cleaners—advertised its “EarthRite” line of products with a claim that a portion of their proceeds would be donated to non-profit environmental groups.<sup>120</sup> Benckiser's claim, however, was completely false, and in fact, the company had not donated a penny.<sup>121</sup> The consent decree prohibited further misrepresentations of such donations and required that, if Benckiser were to make similar claims in the future, the company must “clearly and prominently disclose the method of determining the amount of the donation.”<sup>122</sup>

The Benckiser case is a particularly egregious instance of outright fraudulent CRM. However, the FTC is charged with enforcing the prohibition on deceptive and misleading advertising—a gamut of practices encompassing far more than utter fraud.<sup>123</sup> Indeed, each

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<sup>116</sup> 16 C.F.R. § 453.3(a) (2012).

<sup>117</sup> OFFICE OF GEN. COUNSEL, FED. TRADE COMM'N, A BRIEF OVERVIEW OF THE FEDERAL TRADE COMMISSION'S INVESTIGATIVE AND LAW ENFORCEMENT AUTHORITY, <http://www.ftc.gov/ogc/brfovrw.shtml> (last modified July 2, 2008).

<sup>118</sup> *Id.*

<sup>119</sup> Benckiser Consumer Prods., Inc., 61 Fed. Reg. 10,347 (Fed. Trade Comm'n Mar. 13, 1996) (Consent Agreement with Analysis to Aid Public Comment); Benckiser Consumer Prods., Inc., 62 Fed. Reg. 4765 (Fed. Trade Comm'n Jan. 31, 1997) (Prohibited Trade Practices, and Affirmative Corrective Actions).

<sup>120</sup> Benckiser Consumer Prods., Inc., 61 Fed. Reg. at 10,347; see Reckitt Benckiser, *RB History*, <http://www.rb.com/RB-worldwide/RB-History> (last visited Nov. 4, 2012).

<sup>121</sup> Benckiser Consumer Prods., Inc., 61 Fed. Reg. at 10,347.

<sup>122</sup> Benckiser Consumer Prods., Inc., 62 Fed. Reg. at 4765.

<sup>123</sup> See Federal Trade Commission Act § 5, 15 U.S.C. § 45(a) (2006).

criticism of CRM's form in Part I.C.2 highlights a practice that meets the FTC's definition of "deceptive."<sup>124</sup> For example, vague quantifiers such as a "portion of the proceeds" or "a percentage of the profits" are deceptive.<sup>125</sup> These vague quantifiers are "likely to mislead reasonable consumers under the circumstances," in accordance with the first part of the FTC's definition.<sup>126</sup> Specifically, as demonstrated by market research, the average consumer and even consumers with formal accounting training misperceive and often overestimate the precise dollar amount such vague quantifiers denote.<sup>127</sup> Moreover, the representations of donation amount conveyed by the vague quantifiers are "material" within the meaning of the Deception Statement,<sup>128</sup> as donation amount is a significant factor in consumers' decisions to purchase cause-marketed products over similar, non-cause-marketed products.<sup>129</sup>

The FTC has broad authority to regulate deceptive advertising practices and has specifically defined hundreds of such deceptive practices in its Guides and Trade Practice Rules. As yet, however, the FTC has not identified inadequately transparent CRM among those deceptive practices. Some states, on the other hand, have recognized CRM's potential to exploit charities and consumers since its boom in the '90s, but without a unified effort, they have ultimately failed to construct an effective regulatory regime.

### B. State Law

In 1999, the Attorneys General ("AGs") of sixteen states and the District of Columbia signed a Preliminary Report on Commercial/Nonprofit Product Marketing, concerning the proliferation of CRM and its potential to mislead consumers.<sup>130</sup> In particular, the report instructs companies to avoid misrepresenting that the charity endorses the cause-marketed product and to "not mislead, deceive or confuse the public about the effect of consumers' purchasing decisions on

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<sup>124</sup> See Deception Statement, *supra* note 92, at 177.

<sup>125</sup> See *id.*

<sup>126</sup> See *id.*

<sup>127</sup> See Olsen et al., *supra* note 67.

<sup>128</sup> Deception Statement, *supra* note 92.

<sup>129</sup> Pracejus et al., *supra* note 60, at 25–26.

<sup>130</sup> Press Release, N.Y. Office of the Att'y Gen. et al., What's in a Nonprofit's Name? 1 (Apr. 6, 1999), available at [http://www.ag.ny.gov/sites/default/files/press-releases/archived/full\\_text.pdf](http://www.ag.ny.gov/sites/default/files/press-releases/archived/full_text.pdf). The sixteen signatory states were the following: Arkansas, California, Connecticut, Florida, Illinois, Kentucky, Maryland, Minnesota, Missouri, New Jersey, New Mexico, New York, Pennsylvania, Texas, Vermont, and Wisconsin. *Id.* at 5.

charitable contributions by the consumer or the commercial sponsor.”<sup>131</sup>

Although the state AGs sought “to clarify the consumer law obligations incumbent upon the participants in commercial-nonprofit relationships” in their report, the report does not carry the force of law.<sup>132</sup> The legislatures of approximately twenty states, however, have supplied laws, called commercial co-venturer statutes, with which companies running CRM campaigns in the state must comply.<sup>133</sup>

A commercial co-venturer (“CCV”) is defined, under the New York CCV statute,<sup>134</sup> as the following:

[a]ny person who for profit is regularly and primarily engaged in trade or commerce other than in connection with the raising of funds or any other thing of value for a charitable organization and who advertises that the purchase or use of goods, services, entertainment, or any other thing of value will benefit a charitable organization.<sup>135</sup>

CCV laws apply when a corporation makes a CRM claim by advertising to the public that a purchase will benefit a charitable cause or organization.<sup>136</sup> Although the twenty state laws are not strictly uniform, their basic requirements are similar.<sup>137</sup> For example, all twenty state statutes require that the corporation engaging in CRM have a contract with the charity.<sup>138</sup> Depending on the state, that contract may be required to contain an “accurate description of the offer to be made to the public, the charity’s right to an accounting of the program results, termination rights for the charity, citation to the state’s laws, an estimate of the total donation, and signature by two officers of the charity.”<sup>139</sup>

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<sup>131</sup> *Id.* at 29.

<sup>132</sup> *Id.* at 3.

<sup>133</sup> Ellis Carter, *Charitable Solicitation Laws—Commercial Co-venture*, CHARITYLAWYER BLOG (Feb. 9, 2011), <http://charitylawyerblog.com/2011/02/09/charitable-solicitation-laws-part-1-commercial-co-venture>; Chansky, *supra* note 11. In addition, forty states have professional fundraiser statutes, which regulate entities that solicit on behalf of charities for compensation. For a list of these states, see *Unified Registration Statement*, MULTISTATE FILER PROJECT, <http://www.multistatefiling.org/index.html> (last updated May 2010). Companies engaging in CRM, however, rarely fall within the purview of these statutes, and, thus, the regulations imposed by them are beyond the scope of this Note.

<sup>134</sup> The New York statute is often cited as representative of the majority of state CCV statutes. See, e.g., Chansky, *supra* note 11.

<sup>135</sup> NY EXEC. LAW § 171-a(6) (McKinney 2010).

<sup>136</sup> See Chansky, *supra* note 11.

<sup>137</sup> See *id.*

<sup>138</sup> See *id.*

<sup>139</sup> See *id.* (citing the New York, Georgia, and Massachusetts statutes).

Another basic provision of CCV statutes, embraced by eleven states, is a requirement that the corporation disclose the donation amount.<sup>140</sup> The New York CCV statute, for instance, requires disclosure of “the anticipated portion of the sales price, anticipated percentage of the gross proceeds, anticipated dollar amount per purchase, or other consideration or benefit the charitable organization is to receive.”<sup>141</sup> Finally, in addition to donation amount, some states require disclosure of the particular charitable organization intended as the beneficiary of the donation.<sup>142</sup>

Georgia’s investigation of and ultimate settlement with General Mills regarding Yoplait Yogurt’s “Save Lids to Save Lives” campaign in 1999, although a victory in one sense, demonstrates the fundamental weakness of state-based CRM regulation.<sup>143</sup> Georgia’s Secretary of State properly concluded that Yoplait’s failure to disclose that the company capped its donations at \$100,000 was deceptive and misleading, given that if every lid redeemed nationwide had contributed fifty cents in accordance with Yoplait’s claims, a \$4.7 million donation would have resulted.<sup>144</sup> Georgia, however, could only impose a remedy commensurate to the injury incurred by the state’s own consumers, whose purchases accounted for 1.32 percent of Yoplait’s national sales during the span of the campaign.<sup>145</sup> Thus, General Mills’ agreement with the state stipulated that the company donate \$63,000 (approximately 1.32 percent of \$4.7 million) to the breast cancer charity, far less than the CRM claims promised.<sup>146</sup> State-based regulation lacks the geographical sweep to protect consumers and remedy abuses on a national scale.

### C. *Better Business Bureau Standards for Charity Accountability*

A discussion of CRM regulations requires mention of the Better Business Bureau (“BBB”) Standards for Charity Accountability. The BBB effectively operates as a private regulatory body for investigating businesses and charities and for resolving consumer disputes.<sup>147</sup> The BBB performs these functions through a system of voluntary stan-

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<sup>140</sup> See *id.*

<sup>141</sup> N.Y. EXEC. LAW § 174-c (McKinney 2010).

<sup>142</sup> See, e.g., MASS. GEN. LAWS, ch. 68, § 23 (2011).

<sup>143</sup> See Press Release, Cathy Cox, *supra* note 4.

<sup>144</sup> See *id.*

<sup>145</sup> See *id.*

<sup>146</sup> See *id.*

<sup>147</sup> See *Frequently Asked Questions*, BETTER BUSINESS BUREAU, <http://www.bbb.org/us/bbb-faqs/> (last visited Nov. 4, 2012).

dards, accreditation, and dispute resolution.<sup>148</sup> The Standards for Charity Accountability are the yardstick by which the BBB evaluates all kinds of charitable giving.<sup>149</sup> Standard 19 relates to CRM and provides that CRM claims

should disclose, at the point of solicitation:

- a. the actual or anticipated portion of the purchase price that will benefit the charity (e.g., 5 cents will be contributed to abc charity for every xyz company product sold),
- b. the duration of the campaign (e.g., the month of October),
- c. any maximum or guaranteed minimum contribution amount (e.g., up to a maximum of \$200,000).<sup>150</sup>

While these brief principles provide a uniform standard for crafting CRM claims and target the most conspicuous areas of potential deception, the BBB lacks legal policing powers to enforce them.<sup>151</sup> The most the BBB can do is inform government authorities of deceptive business practices, and those authorities can choose to take corrective action pursuant to law.<sup>152</sup>

Because the BBB is not a state actor, its principles and recommendations need not fall within the boundaries set forth in United States Constitution.<sup>153</sup> Governmental regulators of advertising and marketing, however, including federal and state legislatures and agencies, must tailor their regulations to respect the free speech rights of the commercial entities obliged to follow them.<sup>154</sup>

#### *D. First Amendment Limitations on Advertising Regulation*

Traditionally, commercial speech has merited less First Amendment protection than other forms of expression.<sup>155</sup> The Supreme Court defines commercial speech as expression that “does no more

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<sup>148</sup> See *id.*

<sup>149</sup> See *Standards for Charity Accountability*, BETTER BUSINESS BUREAU, <http://www.bbb.org/us/standards-for-charity-accountability/> (last visited Nov. 4, 2012).

<sup>150</sup> *Id.*

<sup>151</sup> *Frequently Asked Questions*, *supra* note 147.

<sup>152</sup> *Id.*

<sup>153</sup> See *Thomas v. Better Bus. Bureau, of Mid-South*, 79 F. App'x 748, 748–49 (6th Cir. 2003); see also *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976).

<sup>154</sup> See *Hudgens*, 424 U.S. at 513.

<sup>155</sup> *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422 (1993); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562–63 (1980); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976).

than propose a commercial transaction”<sup>156</sup> or that “relate[s] solely to the economic interests of the speaker and its audience.”<sup>157</sup> This definition, according to the Court, encompasses mailings of unsolicited advertisements for contraceptives,<sup>158</sup> outdoor and point-of-sale advertising of tobacco products,<sup>159</sup> media advertising of retail liquor prices,<sup>160</sup> labels on beer bottles indicating alcohol content,<sup>161</sup> and advertising and solicitation for services from a lawyer or Certified Public Accountant.<sup>162</sup> In general, advertising and paid solicitation, unless “inextricably intertwined” with noncommercial speech interests, constitutes commercial speech.<sup>163</sup>

Whereas strict scrutiny, the most stringent standard of judicial review, applies to most restrictions on expression,<sup>164</sup> *Central Hudson Gas and Electric Corp. v. Public Service Commission*<sup>165</sup> sets forth the framework courts use in assessing the constitutionality of commercial speech regulation.<sup>166</sup> The *Central Hudson* test first recognizes that the government may ban commercial speech that is deceptive or misleading or that relates to unlawful activity.<sup>167</sup> Such speech is not protected by the First Amendment.<sup>168</sup> If the speech affected by the regulation is neither deceptive nor related to unlawful activity, however, the speech is protected and the regulation is invalid unless it survives the remaining three prongs of the test: (1) “[t]he State must assert a substantial

<sup>156</sup> *Va. State Bd. of Pharmacy*, 425 U.S. at 762; *see also* *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983).

<sup>157</sup> *Cent. Hudson*, 447 U.S. at 561.

<sup>158</sup> *Bolger*, 463 U.S. at 66 n.13.

<sup>159</sup> *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553–54 (2001).

<sup>160</sup> *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501–04 (1996).

<sup>161</sup> *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481 (1995).

<sup>162</sup> *See, e.g., Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 622–23, 626 (1995); *Edenfield v. Fane*, 507 U.S. 761, 765 (1993).

<sup>163</sup> *See* *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474 (1989) (“We have made clear that advertising which ‘links a product to a current public debate’ is not thereby entitled to the constitutional protection afforded noncommercial speech.”).

<sup>164</sup> *See* *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 789–90 (1988).

<sup>165</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980).

<sup>166</sup> *Id.* at 563–64. *Central Hudson* has borne much degradation in recent cases, perhaps signaling its impending demise and replacement by a more protective standard. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501, 510–14 (1996) (Stevens, J., concurring in the judgment); *id.* at 517 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 518 (Thomas, J., concurring in part and concurring in the judgment); *see also* *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011) (declining to use, but not overruling, *Central Hudson*, and instead applying “heightened scrutiny”). Because predictions regarding the Supreme Court’s future doctrinal maneuvers are beyond this Note’s scope, this Note recites and applies the law to which all lower courts are bound, including *Central Hudson*.

<sup>167</sup> *Cent. Hudson*, 447 U.S. at 563–64.

<sup>168</sup> *See id.* at 566.

interest to be achieved by restrictions on commercial speech”; (2) “the restriction must directly advance the state interest involved”; and (3) the restriction must not be “more extensive than is necessary to serve that interest.”<sup>169</sup> Because enforcement of section 5 of the FTC Act and much of the states’ advertising regulations are predicated on a finding that the communication under review is deceptive or misleading, it handily survives review under *Central Hudson*.<sup>170</sup>

Limited only minimally by the First Amendment, the above collection of federal law and interpretive guides, state CCV statutes, and BBB standards create a patchwork of binding and nonbinding, broad and specific, and strictly enforced and rarely enforced rules for CRM. The result of this patchwork regime is inadequate vindication of consumer interests. Instituting new, comprehensive guidelines, specifically designed to rein in deceptive and abusive CRM and backed by the authority of the FTC, offers the best solution.

### III. PROPOSED CRM GUIDELINES

In addition to the accommodation of CRM within the FTC Act’s ban on deceptive advertising practices, the FTC’s national jurisdiction as a federal agency suggests it is the appropriate body to regulate national CRM campaigns. The only missing elements from full federal regulation of CRM are FTC guidelines setting forth the specific obligations of companies engaging in CRM, and actual FTC enforcement. Because such guidelines would not necessarily create new law so much as they would clarify and particularize what constitutes deceptive practices under section 5 of the FTC Act, the FTC would not likely have to employ the onerous notice and comment procedure required for informal rulemaking under the Administrative Procedure Act.<sup>171</sup>

The ideal FTC Guides for the Use of Cause-Related Marketing Claims (“Proposed CRM Guides”) would combine features of state CCV laws and of BBB Standard 19, sharpen them to close loopholes, and append hypothetical examples to aid in their application. First, however, like most FTC guides, the Proposed CRM Guides would set forth their purpose, primary definitions, and scope. A complete draft

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<sup>169</sup> *Id.* at 563–64, 566.

<sup>170</sup> See Daniel Chapter One v. FTC, 405 F. App’x 505, 505 (D.C. Cir. 2010).

<sup>171</sup> See 5 U.S.C. § 553(b)(3)(A) (2006) (exempting interpretive rules from informal rulemaking procedural requirements). *But see* Guides Concerning the Use of Endorsements and Testimonials in Advertising, 72 Fed. Reg. 2214 (Jan. 18, 2007) (to be codified at 16 C.F.R. pt. 255) (using notice of proposed rulemaking to propose modifications to Guides).



of the Proposed CRM Guides, including these elements, is printed in the Appendix to this Note.

The Proposed CRM Guides would respond to each criticism of CRM's form by requiring disclosure of transparent consumer information "at the point of solicitation."<sup>172</sup> For the purpose of the Proposed CRM Guides, "the point of solicitation" means "any instance in which a direct or implied representation is made that the sale of a product or service will benefit a charitable cause or organization, including, but not limited to product labels or ads in print, on the radio, on television, or on the internet."<sup>173</sup>

The first piece of information the Proposed CRM Guides would instruct marketers to disclose is "the name of the specific organization that benefits from the sale of the product or service."<sup>174</sup> Like the Green Guides, the Proposed CRM Guides would include examples clearly illustrating how their instructions operate in practice:

*Example 1:* The label on a bottle of perfume states that, for every bottle purchased, a certain amount will be donated "to breast cancer research." Because a reasonable consumer has no way of knowing that the donation will be received by a reputable organization, this claim is inadequate under these guides.

*Example 2:* The label on a bottle of perfume states that, for every bottle purchased, a certain amount will be donated "to the Breast Cancer Research Fund of America." Because a reasonable consumer knows the organization that will receive his or her donation and could conceivably research the organization's bona fides before purchasing, this claim complies with these guides.<sup>175</sup>

The second piece of information that the Proposed CRM Guides would instruct marketers to disclose is "the actual or anticipated portion of the purchase price in dollars (\$) that will be donated to the organization."<sup>176</sup>

*Example 1:* The label on a bottle of perfume states, just below the brand name, that "a portion of the proceeds from your purchase of this perfume will be donated to the Breast Cancer Research Fund of America." Because reasonable consumers are unlikely to determine accurately the amount

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<sup>172</sup> See *infra* Appendix § 1.4.

<sup>173</sup> See *infra* Appendix § 1.2.

<sup>174</sup> See *infra* Appendix § 1.4(a).

<sup>175</sup> See *infra* Appendix § 1.4(a).

<sup>176</sup> See *infra* Appendix § 1.4(b).

donated as a result of their purchase based on the “portion of the proceeds” language, this claim is misleading and does not comply with these guides.

*Example 2:* The label on a bottle of perfume states, just below the brand name, that “5% of the profits from your purchase of this perfume will be donated to the Breast Cancer Research Fund of America.” Because reasonable consumers are unlikely to determine accurately the amount donated as a result of their purchase based on the percentage of the “profits” language, this claim is misleading and does not comply with these guides.

*Example 3:* The label on a bottle of perfume states, just below the brand name, that “when you purchase this bottle of perfume, \$1 will be donated to the Breast Cancer Research Fund of America.” Because reasonable consumers are likely to understand the precise amount donated as a result of their purchase based on the specification in dollars per unit sold, this claim complies with these guides.<sup>177</sup>

Third, to address problems like those exemplified by Yoplait’s 1999 “Save Lids to Save Lives” campaign, the Proposed CRM Guides would require disclosure of “the maximum or minimum amount that the company marketing the product or service pledges to donate, regardless of the number of products or services sold, if applicable.”<sup>178</sup>

*Example 1:* Advertisements for XYZ brand yogurt state that for every yogurt lid redeemed, \$0.50 will be donated to the Breast Cancer Research Fund of America. The advertisement does not mention that XYZ brand intends to donate \$0.50 per lid only until its donation reaches \$200,000. Because reasonable consumers would expect that their purchase and subsequent lid redemption contributes \$0.50 to the charity, even after XYZ reached its \$200,000 cap, this claim is deceptive and does not comply with these guides.

*Example 2:* Advertisements for XYZ brand yogurt state that for every yogurt lid redeemed, \$0.50 will be donated to the Breast Cancer Research Fund of America, “up to \$200,000.” Because reasonable consumers are made aware of the possibility that some lid redemptions may not result in a donation if the maximum is reached, this claim complies with these guides.

*Example 3:* Advertisements for XYZ brand yogurt state that for every yogurt lid redeemed, \$0.50 will be donated to the

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<sup>177</sup> See *infra* Appendix § 1.4(b).

<sup>178</sup> See *infra* Appendix § 1.4(c).

Breast Cancer Research Fund of America. The advertisement does not mention that XYZ brand intends to donate at least two million dollars, even if the number of lids required to reach that donation are not redeemed. Because reasonable consumers are likely to think that their purchase and subsequent lid redemption contributes a donation, even though their actions may be irrelevant if fewer lids are redeemed than would amount to a two million dollar donation, this claim does not comply with these guides.<sup>179</sup>

Finally, the Proposed CRM Guides would require disclosure of the “duration of the campaign” to ensure that consumers do not mistakenly believe that their purchase contributes a donation to charity based on an outdated advertisement.<sup>180</sup>

*Example 1:* An advertisement for Healthy 'N Fit cereal states that for each box sold, \$0.50 will be donated to the Breast Cancer Research Fund of America. The ad does not state that such donations will only be made for boxes sold during the month of October. Because consumers who buy a box of Healthy 'N Fit cereal in, e.g., November might reasonably believe that their purchase contributed \$0.50 to the charity, this claim is misleading and does not comply with these guides.

*Example 2:* An advertisement for Healthy 'N Fit cereal states that for each box sold “in the month of October,” \$0.50 will be donated to the Breast Cancer Research Fund of America. This claim complies with these guides.<sup>181</sup>

The Proposed CRM Guides embrace the philosophy that consumers must be well informed in order to make intelligent choices. Unlike other consumer protection regulations, however, which deal with purely commercial transactions, the Proposed CRM Guides bear upon partnerships between commercial entities and charities. Analogies between CRM and charitable solicitation suggest that CRM regulation runs headlong into core free speech protection. The next Part rebuts the argument that the First Amendment prohibits required disclosures in CRM.

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<sup>179</sup> See *infra* Appendix § 1.4(c).

<sup>180</sup> See *infra* Appendix § 1.4(d).

<sup>181</sup> See *infra* Appendix § 1.4(d).

#### IV. DEFENDING THE PROPOSED CRM GUIDES AGAINST FIRST AMENDMENT ATTACK

The First Amendment status of CRM is uncertain, and a potential concern for regulators is that courts will treat CRM more like charitable solicitation than commercial advertising. The First Amendment law of charitable solicitation—that is, door-to-door or telephone appeals for charitable donations—follows a line of cases separate from *Central Hudson* and its progeny. These cases view government attempts to regulate charitable solicitation as much more suspect because, contrary to what the Supreme Court has deemed commercial speech, “charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services.”<sup>182</sup> According to the Court, charitable solicitation assumes higher regard in the view of the First Amendment because it “involve[s] a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes.”<sup>183</sup> This is true, the Court has said, even when a for-profit professional fundraiser solicits on behalf of the charity because the profit-seeking components of the solicitation are “inextricably intertwined” with the persuasive and informative components.<sup>184</sup> The Court has shown willingness to sustain regulation of such solicitation only when the regulated activity amounts to fraud.<sup>185</sup> *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*<sup>186</sup> offers a recent example of the Supreme Court’s First Amendment jurisprudence of charitable solicitation regulation as applied to for-profit telemarketers. That case considered whether the Illinois Attorney General could, consistent with the First Amendment, bring suit against a professional telemarketing service for “falsely representing that ‘a significant amount of each dollar donated would be paid over to [the veterans organization] for its [charitable] purposes while in fact the [fundraisers] knew that . . . 15 cents or less of each dollar would be available’ for those purposes”; meanwhile, the telemarketing service kept eighty-five percent as profit.<sup>187</sup> The Court held that fraudulent charitable solicitation is unprotected speech, but noted that “bare failure to

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<sup>182</sup> *Village of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 632 (1980).

<sup>183</sup> *Id.*

<sup>184</sup> *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 795–96 (1988).

<sup>185</sup> *See Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600 (2003).

<sup>186</sup> *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600 (2003).

<sup>187</sup> *Id.* at 605 (alteration in original).

disclose” the amount of the donation that the company keeps for itself, without “intentionally misleading statements designed to deceive the listener,” does not rise to the level of fraud.<sup>188</sup>

*Madigan* evokes analogies between telemarketers that partner with charities for fundraising and companies that partner with charities for CRM. These analogies suggest that the mandatory disclosures and other rules contained in the Proposed Guidelines unconstitutionally infringe on protected speech, as most CRM is not “intentionally . . . designed to deceive the listener.”<sup>189</sup> On the other hand, fundamental distinctions between telemarketers’ solicitation of charitable donations and CRM indicate that the Supreme Court’s commercial speech precedents provide the more appropriate First Amendment analysis for CRM regulation.

Most importantly, in the context of CRM, the commercial component of the speech, aimed at convincing a consumer to buy the product, is not so “inextricably intertwined” with the noncommercial component, aimed at convincing a consumer to support, for example, the fight against breast cancer. On this point, the Supreme Court’s decision in *Board of Trustees of the State University of New York v. Fox*<sup>190</sup> is instructive. In that case, the Court assessed the validity under the First Amendment of the university’s policy prohibiting the use of campus property for “private commercial enterprises”<sup>191</sup> as applied to a Tupperware party held in a student’s dormitory.<sup>192</sup> The Court reasoned that even though the party involved education regarding “how to be financially responsible and how to run an efficient home,”<sup>193</sup> the speech at issue should be analyzed as commercial in nature because “there is nothing whatever ‘inextricable’ about the non-commercial aspects of these presentations.”<sup>194</sup> The Court’s further explanation of this conclusion sheds light on what it means for commercial and noncommercial speech to be “inextricably intertwined” within the meaning of its precedents:

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<sup>188</sup> *Id.* at 606.

<sup>189</sup> *Id.*; see also *Riley*, 487 U.S. at 795 (striking down a regulation requiring professional fundraisers to disclose to donors the percentage of their donation going to charity because “[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech”).

<sup>190</sup> *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474–75 (1989).

<sup>191</sup> *Id.* at 471.

<sup>192</sup> *Id.* at 472.

<sup>193</sup> *Id.* at 474.

<sup>194</sup> *Id.*

No law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares. Nothing in the resolution prevents the speaker from conveying, or the audience from hearing, these noncommercial messages, and nothing in the nature of things requires them to be combined with commercial messages.<sup>195</sup>

With *Fox* as a guide, CRM, by its nature, is commercial speech because it is certainly possible (1) to advertise and sell yogurt, for example, without professing that breast cancer research saves lives, and (2) to profess that breast cancer research saves lives without advertising and selling yogurt. By contrast, the telemarketing at issue in *Madigan* seems more “inextricably intertwined” with promoting the charity’s cause because the telemarketers’ sole purpose is to solicit donations for the charity, not to sell some unrelated product.<sup>196</sup> Even if the telemarketers are motivated by the prospect of making profit for their company, it is not possible to do so without convincing potential donors to support the charity.

Once the commercial nature of CRM is established, justifying the Proposed CRM Guides under First Amendment doctrine is simple. The foundational principle underlying the Supreme Court’s extension of First Amendment protection to commercial speech is that in our “predominantly free enterprise economy,” the uninhibited flow of commercial information, including advertising, is “indispensable” to the formation of intelligent consumer decisions.<sup>197</sup> Based on the First Amendment’s regard for informed economic decisionmaking, Justice Stevens has stated that “[w]hen a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech.”<sup>198</sup> Therefore, because the Proposed CRM Guides regulate CRM to protect consumers from deceptive and misleading messages regarding the impact of their purchase on the cause at issue, and because they merely require disclosure of beneficial consumer information rather

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<sup>195</sup> *Id.*

<sup>196</sup> See *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 605–06 (2003).

<sup>197</sup> *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

<sup>198</sup> 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (Stevens, J., concurring in the judgment).

than act as a ban on complete forms of advertising, the Proposed CRM Guides are consistent with the First Amendment.<sup>199</sup>

Despite clearing First Amendment hurdles, the Proposed CRM Guides are perhaps vulnerable to a second counterargument: would imposing such disclosure requirements make engaging in CRM so burdensome that firms and charities would abandon the practice altogether? The next Part explains why CRM extinction is highly unlikely.

#### V. COUNTERING THE CLAIM THAT REQUIRED DISCLOSURES WOULD LEAD TO CRM EXTINCTION

Underlying the proposal to regulate CRM's form, rather than taking a more drastic approach favored by critics of CRM's essence, is the object of preserving CRM as a marketing or fundraising tool for the businesses and charities that find it mutually beneficial.<sup>200</sup> Thus, the proposal fails to serve one of its principal objects if the increased costs of required disclosures cause companies to reevaluate CRM as net-negative investment. The evidence, however, suggests that the Proposed CRM Guides would have no such consequence.

Most telling is the ever-high demand for partnerships with the most prominent breast cancer charities, Komen and the Breast Cancer Research Foundation ("BCRF"), in spite of the disclosure requirements the charities themselves impose by contract.<sup>201</sup> Komen, for example, warns potential corporate partners that it "require[s] full disclosure to the consumer regarding the benefit to the charity when donations are raised through a consumer purchase on all packaging, advertising and promotional materials in clear and unambiguous terms."<sup>202</sup> Komen also explicitly adheres to BBB Standard 19.<sup>203</sup> Similarly, BCRF demands that "[e]very partner must state either the dollar amount or the exact percentage and if applicable the minimum or

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<sup>199</sup> See *In re R.M.J.*, 455 U.S. 191, 201-03 (1982). Although "[m]isleading advertising may be prohibited entirely," "the preferred remedy is more disclosure, rather than less." *Id.* at 201, 203.

<sup>200</sup> See *supra* Part II.

<sup>201</sup> See *Corporate Partners*, SUSAN G. KOMEN FOR THE CURE, <http://ww5.komen.org/CorporatePartners.aspx> (last visited Nov. 4, 2012) [hereinafter *Corporate Partners*, SUSAN G. KOMEN FOR THE CURE]; *Corporate Partnership Fact Sheet*, *supra* note 80; see also *Be Aware Before You Buy*, BREAST CANCER RESEARCH FOUND., [http://www.bcrfcure.org/part\\_disclosure.html](http://www.bcrfcure.org/part_disclosure.html) (last visited Nov. 4, 2012); *Corporate Partners*, BREAST CANCER RESEARCH FOUND., <http://www.bcrfcure.org/part.html> (last visited Nov. 4, 2012) [hereinafter *Corporate Partners*, BREAST CANCER RESEARCH FOUND.].

<sup>202</sup> *Corporate Partnership Fact Sheet*, *supra* note 80.

<sup>203</sup> *Id.*

maximum amount being donated to BCRF.”<sup>204</sup> Given that Komen and BCRF have close to 250 corporate partners combined, such disclosure requirements hardly deter companies from engaging in CRM.<sup>205</sup>

Large institutions like Komen, BCRF, and some of their corporate partners have the resources—particularly, the legal resources—to draft sophisticated partnership agreements with disclosure requirements mirroring those suggested in BBB Standard 19.<sup>206</sup> No matter the specific charity or corporate partner, however, consumers of all CRM products deserve assurance that their compassionate purchases have the donative effect they intended. The Proposed CRM Guides would provide consumers that assurance while allowing CRM to continue to flourish.

#### CONCLUSION

Learning from the example set by American Express in its inventive and profitable CRM campaign benefitting the Statue of Liberty restoration efforts, countless businesses have harnessed the power of consumer benevolence to market and sell their products. While many companies use CRM honestly and responsibly, others fail to disclose facts crucial to informed consumer choice, yet attract buyers with pink ribbons and promises of “saving lives.” This irresponsible use of CRM is regulable as a deceptive marketing practice under section 5 of the FTC Act, and the FTC should exercise its regulatory authority under that Act to prevent exploitation of consumer consciences and promote informed purchasing decisions.

Trends suggest that more consumers will begin to restrict their shopping to companies that strive for the public good. As they do so, CRM, including pink ribbon products, will only proliferate. If the FTC adopted a guide like the one proposed in this Note, the sea of pink that has flooded our grocery stores and shopping malls will at least be full of credible claims that pink purchases contribute to the fight against breast cancer.

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<sup>204</sup> *Be Aware Before You Buy*, *supra* note 201.

<sup>205</sup> See *Corporate Partners*, BREAST CANCER RESEARCH FOUND., *supra* note 201; *Corporate Partners*, SUSAN G. KOMEN FOR THE CURE, *supra* note 201.

<sup>206</sup> See *Corporate Partnership Fact Sheet*, *supra* note 80; *BCRF Corporate Alliances Guidelines*, BREAST CANCER RESEARCH FOUND., [http://www.bcrfcure.org/word/part\\_become.doc](http://www.bcrfcure.org/word/part_become.doc) (last visited Nov. 4, 2012).



## APPENDIX

**Proposed Guides for the Use of  
Cause-Related Marketing<sup>207</sup>**

§ 1.1 Statement of purpose. These guides represent administrative interpretations of laws administered by the Federal Trade Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. These guides specifically address the application of Section 5 of section 5 of the Federal Trade Commission Act to cause-related marketing practices. They provide the basis for voluntary compliance with such laws by members of industry. Conduct inconsistent with the positions articulated in these guides may result in corrective action by the Commission under Section 5 if, after investigation, the Commission has reason to believe that the behavior falls within the scope of conduct declared unlawful by the statute.<sup>208</sup>

§ 1.2 Definitions. For purposes of these guides, “cause-related marketing” means marketing a product or service by associating it with a charitable cause or organization and, whether directly or by implication, representing that a sale of such product or service will benefit the charitable cause or organization.

For the purposes of these guides, “clearly and conspicuously” means that, considering the placement of a disclosure in an ad or on a label, the proximity of the disclosure to the relevant claim, the prominence of the disclosure in the ad or on a label, the potential of other elements of the ad or the label to distract from the disclosure, and other relevant circumstances, a reasonable consumer would understand the substance of the disclosure.<sup>209</sup>

For the purposes of these guides, “the point of solicitation” means any instance in which a direct or implied representation is made that the sale of a product or service will benefit

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<sup>207</sup> In terms of the general form of these guides, the Green Guides, 16 C.F.R. pt. 260 (2012), and the Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. pt. 255 (2012), served as models.

<sup>208</sup> This paragraph is modeled after a similar paragraph in the Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.0(a).

<sup>209</sup> This “clear and conspicuous” definition is modeled after elements that the FTC has considered in evaluating disclosures of material terms in advertising. *See* FEDERAL TRADE COMM’N, DOT COM DISCLOSURES: INFORMATION ABOUT ONLINE ADVERTISING 5–6 (2000), available at <http://business.ftc.gov/sites/default/files/pdf/bus41-dot-com-disclosures-information-about-online-advertising.pdf>.

a charitable cause or organization, including, but not limited to product labels or ads in print, on the radio, on television, or on the Internet.

**§ 1.3 Scope of guides.** These guides apply to cause-related marketing claims included in labeling, advertising, promotional materials and all other forms of marketing, including marketing through digital or electronic means, such as the Internet or electronic mail.

Because the guides are not legislative rules under Section 18 of the FTC Act, they are not themselves enforceable regulations, nor do they have the force and effect of law. The guides themselves do not preempt regulation of other federal agencies or of state and local bodies governing the use of environmental marketing claims. Compliance with federal, state or local law and regulations concerning such claims, however, will not necessarily preclude Commission law enforcement action under Section 5.<sup>210</sup>

**§ 1.4 Required Disclosures.** Cause-related marketing promotions should clearly and conspicuously disclose, at the point of solicitation:

- (a) the name of the specific organization that benefits from the sale of the product or service;

*Example 1:* The label on a bottle of perfume states that, for every bottle purchased, a certain amount will be donated “to breast cancer research.” Because a reasonable consumer has no way of knowing that the donation will be received by a reputable organization, this claim is inadequate under these guides.

*Example 2:* The label on a bottle of perfume states that, for every bottle purchased, a certain amount will be donated “to the Breast Cancer Research Fund of America.” Because a reasonable consumer knows the organization that will receive his or her donation and could conceivably research the organization’s bona fides before purchasing, this claim complies with these guides.

- (b) the actual or anticipated portion of the purchase price in dollars (\$) that will be donated to the organization;

*Example 1:* The label on a bottle of perfume states, just below the brand name, that “a portion of the proceeds

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<sup>210</sup> The language in this paragraph is taken almost verbatim from a similar paragraph in the Green Guides, 16 C.F.R. § 260.1(a)–(b) (2012).

from your purchase of this perfume will be donated to the Breast Cancer Research Fund of America.” Because reasonable consumers are unlikely to determine accurately the amount donated as a result of their purchase based on the “portion of the proceeds” language, this claim is misleading and does not comply with these guides.

*Example 2:* The label on a bottle of perfume states, just below the brand name, that “5% of the profits from your purchase of this perfume will be donated to the Breast Cancer Research Fund of America.” Because reasonable consumers are unlikely to determine accurately the amount donated as a result of their purchase based on the percentage of the “profits” language, this claim is misleading and does not comply with these guides.

*Example 3:* The label on a bottle of perfume states, just below the brand name, that “when you purchase this bottle of perfume, \$1 will be donated to the Breast Cancer Research Fund of America.” Because reasonable consumers are likely to understand the precise amount donated as a result of their purchase based on the specification in dollars per unit sold, this claim complies with these guides.

- (c) the maximum or minimum amount that the company marketing the product or service pledges to donate, regardless of the number of products or services sold, if applicable;

*Example 1:* Advertisements for XYZ brand yogurt state that for every yogurt lid redeemed, \$0.50 will be donated to the Breast Cancer Research Fund of America. The advertisement does not mention that XYZ brand intends to donate \$0.50 per lid only until its donation reaches \$200,000. Because reasonable consumers would expect that their purchase and subsequent lid redemption contributes \$0.50 to the charity, even after XYZ reached its \$200,000 cap, this claim is deceptive and does not comply with these guides.

*Example 2:* Advertisements for XYZ brand yogurt state that for every yogurt lid redeemed, \$0.50 will be donated to the Breast Cancer Research Fund of America, “up to \$200,000.” Because reasonable consumers are made aware of the possibility that some lid

redemptions may not result in a donation if the maximum is reached, this claim complies with these guides.

*Example 3:* Advertisements for XYZ brand yogurt state that for every yogurt lid redeemed, \$0.50 will be donated to the Breast Cancer Research Fund of America. The advertisement does not mention that XYZ brand intends to donate at least two million dollars, even if the number of lids required to reach that donation are not redeemed. Because reasonable consumers are likely to think that their purchase and subsequent lid redemption contributes a donation, even though their actions may be irrelevant if fewer lids are redeemed than would amount to a two million dollar donation, this claim does not comply with these guides.

(d) the duration of the campaign.

*Example 1:* An advertisement for Healthy 'N Fit cereal states that for each box sold, \$0.50 will be donated to the Breast Cancer Research Fund of America. The ad does not state that such donations will only be made for boxes sold during the month of October. Because consumers who buy a box of Healthy 'N Fit cereal in, e.g., November might reasonably believe that their purchase contributed \$0.50 to the charity, this claim is misleading and does not comply with these guides.

*Example 2:* An advertisement for Healthy 'N Fit cereal states that for each box sold "in the month of October," \$0.50 will be donated to the Breast Cancer Research Fund of America. This claim complies with these guides.