PROFITING IN (RED): THE NEED FOR ENHANCED TRANSPARENCY IN CAUSE-RELATED MARKETING

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Since its inception in 2006, the Red campaign has worked to build the (Product)^{RED}[1] brand by teaming with major companies to raise money for the Global Fund to Fight AIDS, Tuberculosis, and Malaria ("Global Fund").[2] The partner companies ("Partners") license the right to use the Red label, and produce, market, and sell Red items. They then send a portion of the sale proceeds to the Global Fund, which in turn uses the funds to finance AIDS programs in Africa. The Red logo has become ubiquitous, appearing on items as varied as coffee bean packets, strollers, t-shirts, computers, thank-you cards and, looking ahead, many things in between.[3] The marketing for the brand has translated into a proliferation of billboards, storefront displays, magazine covers, and television and web advertisements. Celebrities such as Oprah Winfrey, Stephen Spielberg, and Chris Rock appear in promotional materials, urging consumers to make conscientious purchasing decisions, and calling for more awareness about AIDS in Africa.[4] The campaign was itself founded by two

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1. A word indicating the corporate identity of a given corporate partner is intended to replace the word "Product"—e.g., (Starbucks)^{RED} or (Nike)^{RED}. As Tamsin Smith, former President of Red explained: "We call the parentheses or brackets the "embrace." Each company that becomes (RED) places their logo in the embrace. And this embrace is elevated in superscript to the power of RED. Thus the name: (Product)^{RED}." YOUNGME MOON ET AL., HARVARD BUSINESS SCHOOL, (PRODUCT) RED (A) 4 (2009), *available at* http://www.people.fas.harvard.edu/~hiscox/RED(A).pdf [hereinafter HBS].

2. The Global Fund, based in Geneva and established in 2002, "is a unique global public/private partnership dedicated to attracting and disbursing additional resources to prevent and treat HIV/AIDS, tuberculosis and malaria. This partnership between governments, civil society, the private sector and affected communities represents a new approach to international health financing. The Global Fund works in close collaboration with other bilateral and multilateral organizations to supplement existing efforts dealing with the three diseases." The Global Fund, About the Global Fund, http://www.theglobalfund.ord/en/about (last visited Mar. 1, 2010). To date, it has "approved funding of $19.3 billion for more than 572 programs in 144 countries" and it "provides a quarter of all international financing for AIDS globally, two-thirds for tuberculosis and three quarters for malaria." *Id.*

3. See (Red), Shop, http://www.joinred.com/Shop.aspx (last visited Mar. 1, 2010), for a sampling of current products.

4. See Look to the Stars, (Red), http://www.looktothestars.org/charity/135-red (last visited Mar. 1, 2010), for a more complete list of celebrity supporters.

celebrities: U2 frontman Bono and activist-politician Bobby Shriver.[5]

Slogans such as "Desire and virtue. Together at last" and "Buy (RED). Save lives."[6] have caught on: the campaign has generated over $145 million dollars in contributions to the Global Fund.[7] By way of comparison, total private sector contributions to the Global Fund prior to Red's launch totaled around $5 million dollars over three years.[8] Notably, though Red was established with the express purpose of generating charitable funds to "help eliminate AIDS in Africa," the entity behind the initiative is not itself a charity.[9] Instead, the entity

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5. See HBS, *supra* note 2, at 2-4, for background on the creation of Red. With respect to the individual roles of Shriver and Bono in establishing Red, a conversation with current Red CEO Susan Smith Ellis on February 10, 2009, confirmed that Bobby Shriver and Bono co-founded the limited liability company that owns the rights to the Red logo (The Persuaders), and that Shriver acted as CEO of that entity for the first 18 months of the Red initiative. Interview with Susan Smith Ellis, CEO, Red (Feb. 10, 2009) [hereinafter CEO Phone Interview]. Though he was paid for occupying the CEO position, Shriver stopped receiving any compensation after Smith Ellis took over in July 2007. *Id.* Bono has never received any payment for his involvement. Bono remains on the Board of Directors, which is responsible for approving the company's strategy, and continues to promote and represent Red in the media. Shriver no longer has any formal involvement with Red though he too continues to be a spokesperson for the campaign. *Id.*

6. (Red), The (Red) Idea, http://www.joinred.com/Learn/AboutRed/Idea.aspx (last visited Mar. 1, 2010) [hereinafter The (Red) Idea] and http://www.joinred.com/Learn/AboutRed/Idea.aspx.

7. Note that this amounts to under 2 percent of the total donations made to the Global Fund. *See* Ron Nixon, *Bottom Line for Red*, N.Y. TIMES, Feb. 6, 2008, *available at* http://www.nytimes.com/2008/02/06/business/06red.html. According to the Red website, "The amount of funds generated by (RED) to date is the equivalent of providing more than 890,000 people with HIV with lifesaving antiretroviral medicine for one year." The (Red) Idea, *supra* note 6. The remaining 98 percent comes from governments, with a small amount coming from private actors. *See* The Global Fund, Pledges and Contributions, http://www.theglobalfund.org/en/pledges/ (contains a spreadsheet tracking donations to the fund by public and private sources).

8. HBS, *supra* note 2, at 8.

9. Even CNBC refers to (Product) Red as a nonprofit. *See CNBC: Buy (Red), Save Lives* (CNBC television broadcast Oct. 1, 2009), *available at* http://www.cnbc.com/id/15840232?video=1281859271&play=1. *But see* (Red), Frequently Asked Questions, http://www.joinred.com/Learn/AboutRed/FAQs.aspx (last visited Mar. 1, 2010) [hereinafter Red FAQs] ("(Red) is not a charity. It is a new business model.").

that owns the Red label, and that enters into the licensing agreements with the Partners is a limited liability company incorporated in Delaware under the name The Persuaders ("Persuaders").[10]

Red fits well into what the Index for Global Philanthropy refers to as "Private Philanthropy": a source of development assistance made up of contributions from foundations, corporations, private and voluntary organizations, academic institutions, and religious organizations.[11] In the United States, the capital generated by these private actors is rapidly growing, and already exceeds Official Development Assistance.[12] Private philanthropy includes many initiatives that are more or less similar to Red in ambition (increasing funding for development-related projects), though they differ substantially in design.[13]

Held up as an example of innovative financing,[14] Red occupies a number of different categories. It is a licensing

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10. State of Delaware, Delaware Department of State: Division of Corporations, https://delecorp.delaware.gov/tin/GINameSearch.jsp (search "General Information Name Search" for "The Persuaders"); (Red), Privacy Policy, http://www.joinred.com/Privacy.aspx (last visited Mar. 1, 2010).

11. HUDSON INST. CTR. FOR GLOBAL PROSPERITY, THE INDEX OF GLOBAL PHILANTHROPY 2008, at 17, *available at* https://www.hudson.org/files/documents/2008%20Index%20-%20Low%20Res.pdf [hereinater INDEX].

12. *Id.*

13. *See id.* at 3-9 (describing a variety of programs that blur the line between business and international philanthropy).

14. *See, e.g.*, The Global Fund, Private Sector and Nongovernment Donors, http://www.theglobalfund.org/en/privatesector/red/ (last visited Mar. 8, 2010) ("(PRODUCT) RED has become one of the largest consumer-based income-generating initiatives by the private sector for an international humanitarian cause"); Alex Shoumatoff, *The Lazarus Effect*, VANITY FAIR, July 2007, *available at* http://www.vanityfair.com/politics/features/2007/07/lazarus200707 (describing Red as a possible "revolution in consumer-driven philanthropy"); Paul Valley, *The Big Question: Does the RED Campaign Help Big Western Brands More Than Africa?*, THE INDEPENDENT, Mar. 9, 2007, *available at* http://www.independent.co.uk/news/world/politics/the-big-question-does-the-red-campaign-help-big-western-brands-more-than-africa-439425.html ("What the RED initiative has set out to do . . . is create a stream of revenue for the fight against Aids in Africa which will far exceed one-off payments from corporate philanthropy budgets. It looks set to create a major source of cash for the Global Fund, and one that is sustainable. It is an entirely new model for fundraising."); Jonathan Greenblatt, *Building a Better (Red)*, WORLDCHANGING, Oct. 31, 2006, http://www.worldchanging.com/archives/

arrangement, whereby the Partners pay the Persuaders a licensing fee in exchange for the right to append the Red label to a segment of their product line. Red is also an example of cause-related marketing ("CRM"), where products are marketed not only on the basis of their quality or functionality, but also on the basis of their association with an external cause—here, alleviating the effects of AIDS in Africa.[15] Red is a "co-venture,"[16] in which the Partners commit to give a (variable) portion of the sale proceeds to a charity—here, the Global Fund. Additionally, Red is a large-scale "co-branding" effort, in that each of the Partners assigns a portion of its marketing budget to promote a single brand, Red, thus multiplying the effect of the investment.

This article makes four main points. The first is a critique: the Red model does not operate in a transparent fashion, a weakness that should be remedied. The second is that Red is not alone: cause-related marketing and co-venture initiatives that blend commercial and philanthropic interests often suffer from similar deficiencies in transparency. The third is that the social costs of non-transparency are significant and meaningful, both in terms of protecting consumers from confusion and deceit and in terms of maintaining public trust in philanthropy generally. The last point is that charities' regulation offers useful tools and mechanisms for governing the cause-related marketing industry and that this regulatory framework should be updated and improved to mitigate the social costs of non-transparency.

005150.html ("Unlike other models, each member is not simply donating money, but doing something heretofore unheard of—they are developing new consumer products with a common branding strategy); HBS, *supra* note 2, at 8 (explaining how Red differs from traditional charity models).

15. *See* Sandra Miniutti, *Hunting for Cause Related Marketing's Charitable Impact*, Charity Navigator, June 1, 2004, http://www.charitynavigator.org/index.cfm/bay/content.view/cpid/203 (last visited Mar. 1, 2010) (describing how the Partner borrows the charity's image in order to improve its own).

16. Defined as: "[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 advertised that the purchase or use of goods, services, entertainment or any thing of value will benefit a charitable organization." N.Y. EXEC. LAW § 171-a.

The aim is not to launch an attack on Red, but rather to address the following questions: what regulatory issues surface through the Red model, and how should these be addressed and managed? Further, assuming that the goals that have animated this particular initiative are worthy and good, and that the Red initiative comes as a legitimate response to an increasing demand for conscientious or compassionate forms of consumption, how can regulation serve to either support, correct, or otherwise oversee the practices of entities shaping this trend?

The article first provides a description of the Red model, followed by a discussion of the criticisms leveled against it by a range of commentators. It then argues that Red, and other CRM initiatives that resemble it, should be subject to additional regulatory oversight and brought in line with more familiar charitable actors, such as professional fundraisers and commercial co-venturers. The paper concludes by proposing new reporting requirements and new interpretations of existing charities regulation rules to ensure better integration of commercial actors into the philanthropy arena.

I. How Does Red Work?

A. *Contracts and Stakeholders*

Over the course of Red's existence, the Persuaders has entered into at least thirteen multi-year licensing agreements with as many Partners.[17] To date, those Partners include American Express (U.K. only, since 2006), Apple (since 2006), Bugaboo (since 2009), Converse (since 2006), Dell (since 2008), Emporio Armani (since 2006), Gap (since 2006), Hallmark (since 2007), Motorola (2006-2009), Nike (since 2009), Penguin Classics (since 2010), Starbucks (since 2008), and Microsoft (for the Vista operating system) (2008-2009).[18]

The Persuaders and the Partners decline to make these agreements available to the public. However, from various re-

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17. HBS, *supra* note 2, at 4. These agreements are usually for five-year periods. http://promomagazine.com/retail/marketing_red_brigade/index.html.

18. *(RED) at Three: Lessons Learned/Plans for the Future*, Cause Marketing Forum Teleconference, Sept. 10, 2009 at minute 10, *available at* http://3blmedia.com/theCSRfeed/RED-Three-Lessons-LearnedPlans-Future [hereinafter Teleconference].

ports on the Red initiative and from conversations with the Global Fund and the Persuaders, one may draw five general conclusions about their content: first, the agreements grant Partners the right to append the Red label to a subset of their product line in exchange for an undisclosed licensing fee that differs for each Partner.[19] They also set out the financial and procedural terms on which the donations from the Partners to the Global Fund will be made, including how those terms can be amended;[20] financial commitments to the Global Fund differ for each Partner.[21] Third, they require that the Partners observe certain social responsibility guidelines.[22] Fourth, the agreements detail the rules applying to use of the Red label in product advertising, and provide for review and approval of

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19. While there is no available data on how much the Partners pay in licensing fees to join the Red partnership, the amounts are sufficient to supply Red's operating budget. As noted in the Teleconference, the licensing fees are used "to run Red. So it includes our staffing costs, our offices, you know, business development and our marketing program." *Id.* at minute 45. Little information is available concerning Red's overhead costs, other than that the organization has an estimated staff of twenty-two and has offices in New York and London. *Id.* at minute 47; CEO Phone Interview, *supra* note 5. One would assume that staff members receive competitive salaries, as a number of them came from the marketing divisions of the Partners in the private sector.

20. "In RED, the proportional contribution of sales/profits varies dramatically, with almost every company defining its help in a different way." Stefano Ponte, Lisa Ann Richey & Mike Baab, *Bono's Product (RED) Initiative: corporate social responsibility that solves the problems of 'distant others'*, 30 THIRD WORLD Q. 301, 311 [hereinafter Ponte et al.]. If a Partner seeks to change its pledge to the Global Fund, it must renegotiate with The Persuaders. CEO Phone Interview, *supra* note 5.

21. The Red website states that, under these arrangements, Partners give up to 50 percent of profits on Red items to the Global Fund. (Red) FAQs, *supra* note 9. Susan Smith Ellis explained that to her knowledge none of the Partners had imposed a cap on their contributions to the Global Fund; however, if a particular product failed to generate profits for the Partner, the licensing agreements also contain a provision that requires a minimum donation to be made to the Fund. CEO Phone Interview, *supra* note 5; *see also* (Red) FAQs, *supra* note 9 (select "How does (RED) work?").

22. All "Proud Partners" enter into a legally binding agreement requiring them to maintain professional standards of business conduct in their manufacturing and sourcing. CEO Phone Interview, *supra* note 5. Further, this agreement specifically requires these partners to work towards providing HIV/AIDS counseling and treatment to any person working for that company or making a (RED) product. *Id.*

the Partners' advertising materials by the Persuaders.[23] Finally, they grant the Partners category-exclusivity for their product.[24] This exclusivity feature provides each Partner with an assurance that no competitor will be given the same privileges with respect to the use of the Red label for the particular category of goods at issue in the contract. In other words, if it enters into an agreement with Motorola covering cell phones, the Persuaders cannot then enter into a subsequent agreement with Nokia for cell phones. However, companies that generally occupy the same market space, such as Dell and Apple, may enter into an agreement with Red for non-competing products. Thus Apple's exclusivity is for MP3 players, while Dell's is for laptops. In this way, each Partner secures a niche in the Red market.

In addition to the licensing agreement, each Partner also enters into an agreement with the Global Fund. According to a Global Fund officer, these agreements mainly pertain to the use of the Fund's name and logo in advertising and promotional materials disseminated by the Partners.[25] The Global Fund does not negotiate any of the financial terms with the Partners or co-venturers, nor does it pay out any fees to these entities.[26] Thus, each Partner signs two agreements, one with Red and one with the Global Fund, and together these form a package of intertwined but independently negotiated obligations.

Separately, the Global Fund has an agreement with the Persuaders, which lays out guidelines for the Red partnership as a whole.[27] This agreement is also undisclosed, but two contractual features communicated in correspondence with the Global Fund deserve mention: First, the agreement requires that the Global Fund disclose the contributions received from the co-venturers as a single aggregate figure, meaning that individual contributions made by each company Partner cannot

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23. CEO Phone Interview, *supra* note 5.

24. HBS, *supra* note 2, at 4-5; CEO Phone Interview, *supra* note 5; Betsy Spethmann, *The RED Brigade*, PROMOMAGAZINE, Jan. 1, 2007, http://promomagazine.com/retail/marketing_red_brigade/.

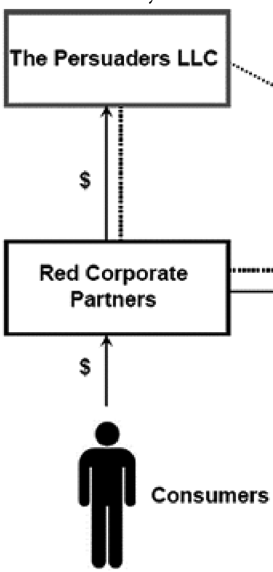
25. Phone Interview with Global Fund (RED) Partnerships Officer, Private Sector Resource Mobilization (Sept. 17, 2009, 10:00am) (notes on file with author).

26. *Id.*

27. *Id.*

be disclosed.[28] Second, the agreement earmarks the funds raised by the Red partnership for AIDS relief work, specifically in Africa, and with an emphasis on programming geared at women and children.[29] Both of these features constitute departures from the Global Fund's usual practice, as discussed in more detail below.

The chart below helps to recap the structure of the Red model. The dotted lines represent contracts or agreements between the three stakeholders of the model, namely the Persuaders, the Partners, and the Global Fund. The solid lines represent money flows between these participants.



28. Email from Global Fund (RED) Partnerships Officer (July 29, 2009, 4:25am) (on file with author) [hereinafter Jul. Global Fund Partnerships Officer Email] ("we cannot provide you with a breakdown of (RED) contributions by individual partner since this information is not publicly available and we only share this with (RED) in our quarterly financial reports. The reason for this is that it was agreed with (RED) and partners at the outset of the partnership that the spirit of the initiative is that all partners come together under one brand and that their contributions would therefore also always only be communicated as one unified contribution.").

29. Although this was the first time that any Global Fund contributor had targeted funds, all private donors now have the right to do so. *See* HBS, *supra* note 2, at 7 (stating that the Red campaign was the first time Global Fund approved the targeting of funds by donors); Jul. Global Fund Partnerships Officer Email, *supra* note 25.

This figure shows that the only charity in the Red model is the Global Fund; it also shows that the only donors to the Global Fund are the Partners, not the Persuaders or the consumers.[30] There are important ways in which the Red structure differs from more traditional CRM initiatives (also referred to as "commercial co-ventures" in the charities' regulation context), which usually involve an arrangement between a charity and a business whereby the business uses its affiliation with the charity (and the cause it serves) to market its products and thereby boost its corporate social responsibility ("CSR") image and its sales. In turn, the charity receives financial contributions from the business, often as a share of product sales or as a royalty fee for use of its name.[31] Authors Berglind and Nakata adopt the following definition for CRM: "the practice of marketing a product, service, brand or company through a mutually beneficial relationship with a non-profit or social organization."[32]

The Red model presents an interesting variation on this definition because there are not two, but three stakeholders involved, the Global Fund charity, the Partner businesses and the Persuaders.[33] Additionally, while Red is a brand that was

30. As will be discussed below, individuals can donate directly to the Global Fund from the Red website, but that feature is not part of the Red business model. *See infra* note 94. Additionally, a blog post by William Easterly and Laura Freschi revealed that The Persuaders is required in its constitutional charter to transfer any profits to the Global Fund. Posting of William Easterly & Laura Freschi to Aid Watch, Cui Bono? The murky finances of Project (RED)™, http://aidwatchers.com/2009/12/cui-bono-the-murky-finances-of-project-red%E2%84%A2/ (Dec. 8, 2009). No such transfer has occurred to date, however. CEO Phone Interview, *supra* note 5; Telephone Interview with Global Fund.

31. For a helpful review of some prominent CRM initiatives, see Cause Marketing Forum Case Studies, http://www.causemarketingforum.com/casestudies.asp (last visited Mar. 10, 2010). For a helpful description of the different modes of cause-related marketing, see Matthew Berglind & Cheryl Nakata, *Cause-related Marketing: More Buck than Bang?*, 48 BUS. HORIZONS 443, 443-48 (2005)

32. Berglind & Nakata, *supra* note 31, at 444.

33. The I Do Foundation provides an interesting counter-example to Red as a CRM initiative that also involves multiple actors. Its purpose is to raise money for charities (dealing with a range of different causes, unlike Red) by matching couples who are getting married with charities. This is done in a few ways: couples can create a "charity registry" and ask their guests to donate directly to the cause(s) of their choice (and receive a tax deduction) or they can have a conventional items-based registry, where the

created specifically to raise money for the Global Fund, it doesn't belong to the Global Fund; it belongs to the Persuaders.

One of the driving features of the Red model (and of most CRM initiatives) is that the costs associated with advertising Red-labeled products are borne primarily by the Partners, not the Global Fund.[34] The companies use their marketing budgets to advertise their Red products and their involvement in the partnership.[35] It is not easily determined whether this increases the Partners' marketing expenses overall. At the end of its first year, however, with six partners in the initiative, Red

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items generate donations to charity (measured either as a share of the sale price or as a percentage of profits). *See* WeddingChannel.com, Charity Registry Frequently Asked Questions, http://www.idofoundation.org/wc/faq.html (last visited Mar. 10, 2010); Telephone interview with I Do Foundation Executive Director, Grant La Rouche, (Feb. 9, 2010, 3:00pm) (on file with author). The I Do Foundation differs from Red by its (a) direct involvement with the (registry) consumers and charity, (b) status as a not-for-profit, and (c) lack of involvement in marketing the causes selected by the couples. *Id.* The two also differ in their relationships with partner charities: the I Do Foundation staff performs some review to ensure that selected charities are in fact tax-exempt organizations with a legitimate charitable purpose, but very little communication occurs beyond that. In contrast, Red and the Global Fund have a much tighter relationship because the Global Fund is the only charity that Red is affiliated with. Another CRM example is the Susan G. Komen for the Cure Campaign, which raises money for breast cancer research. Susan G. Komen For the Cure, http://ww5.komen.org (last visited Mar. 10, 2010). Like Red, Komen licenses out its Pink Ribbon logo (with a dot representing a head above the ribbon's knot) in exchange for a financial commitment from various businesses; however, Komen owns its charity, and generally does not issue licenses on a category-exclusive basis. Telephone Interview with Komen Corporate Relationships Officer (Feb., 2010) (notes on file with author). For a list of Komen's corporate partners, see Susan G. Komen For the Cure, Corporate Partners, http://ww5.komen.org/corporatepartners.aspx (last visited Mar. 10, 2010).

34. Red FAQ's, *supra* note 9 (follow the "How does (RED) finance all of the big marketing campaigns behind (RED) products?" link) ("Actually, (RED) doesn't pay for those campaigns. As part of our relationship with our partner brands, (RED) works with these companies to direct some of their overall marketing budget to market not only the (RED) products but ALSO the issues . . . . These are funds from their existing marketing budgets that if not used to market (RED), would be spent to market other products that do not contribute at all to the fight against AIDS in Africa.").

35. The licensing agreements intentionally target the marketing divisions of the companies—rather than their foundation arms—to maximize access to advertising funds. HBS, *supra* note 2, at 8.

was blasted by the advertising magazine *Ad Age* for having spent $100 million on advertising while raising less than a fifth of that amount, $18 million, for the Global Fund.[36] Co-founder Bobby Shriver published a response in the same magazine saying that the advertising figures were inflated "by more than 50%" and that the campaign had actually raised $25 million for the Global Fund.[37] (Note that this is still a ratio of 2 to 1.) *Ad Age* stood by its original estimates.[38]

There are also important ways in which entering the partnership might actually offset expenditures for the Partners. Indeed, by choosing to join the Red campaign, which has cultivated corporate partnerships primarily among well-known mega-companies,[39] the Partners can benefit from a top-notch co-branding endeavor.[40] Each Red Partner has significant resources and experience devoted to marketing, as well as a large consumer following.[41] With at least eleven companies

36. Mya Frazier, *Costly Red Campaign Reaps Meager $18 Million*, ADVERTISING AGE, Mar. 5, 2007, *available at* http://adage.com/article?article_id=115287.

37. Bobby Shriver, *CEO: Red's Raised Lots of Green*, ADVERTISING AGE, Mar. 12, 2007, *available at* http://adage.com/article?article_id=115504

38. *Id.*

39. See (Red), Partners, http://www.joinred.com/Learn/Partners.aspx, for a list of major partners. Red also has partnerships with smaller companies like Diptyque candles and the music recognition program, Shazam, as well as limited edition partnerships with Channel Islands surf boards and magazines like *Vanity Fair*, but those contractual arrangements are less clear and require further research. *Id.*

40. *See* HBS, *supra* note 2, at 4 ("We didn't just want simply to infiltrate their marketing budgets. We wanted the partners to do what they do best—design, market and promote cool stuff."); Berglind & Nakata, *supra* note 31, at 448 ("This is one of the advantages of cause-related marketing: that it provides marketing talent and business acumen that is often in greater supply in corporations than in non-profits.").

41. *See Brand Therapy — Product Red*: *Product pro bono*, BRAND STRATEGY, Apr. 16, 2007, at 12 (describing Red as enjoying "the backing of some of the mightiest marketing muscle in the world"); Bobby Shriver, *Just (get them to) do it for the good of mankind*, BRAND STRATEGY, Jun. 12, 2007, at 11 (describing the amount of marketing by the partners); Mike Hughlett & Sandra Jones, *One brand, but they're not the same: Bono, friends join corporations to launch revolutionary concept in U.S.*, CHIC. TRIB., Oct. 13, 2006 (listing the corporations involved in Product Red). Together, the co-branding and category-exclusivity features of the Red model make new collaborations possible. For example, the Gap now sells Red Converse sneakers at its stores, and celebrity spokespeople for Motorola's Red line wear Gap's Red t-shirts in the advertisements. *See, e.g.*, Chris Rock – Spread (Red), http://www.youtube.com/watch?v=

engaged in the effort to advertise a single brand, and more companies likely on the way, each Partner receives more bang for the same advertising buck because its investment is multiplied across the Partners' budgets.[42] Setting up a high-profile co-branding initiative that spans the budgets of some of the biggest companies in the world and that combines commercial benefits with a compelling philanthropic agenda is the marketing-engineering feat that earned Bobby Shriver the Advertising Person of the Year Award in 2007.[43]

The Persuaders, as the owner of the Red brand and coordinator of the corporate partnerships, is itself involved in the co-branding effort. Its main purpose is to manage and disseminate the brand, and this purpose if fulfilled in a number of ways.[44] Running the Red website is a central component of the Persuaders' coordinator role, as is developing slogans for

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WJCWASMK7T8. Gap also sells tickets for the Red Nights concert series. *See, e.g.*, John Legend.com, John Legend and Gap Join (PRODUCT) RED to Help Eliminate AIDS in Africa, http://www.johnlegend.com/us/news/john-legend-and-gap-join-productred-help-eliminate-aids-africa (last visited Mar. 2, 2010).

42. *See* HBS, *supra* note 2, at 8 (citing to a one-year post-launch study on Red awareness that found that 17 percent of the American public knew that Red was about AIDS in Africa). For Red's (undefined) "core demographic" that percentage rose to 32 percent. *Id.* Returning to the comparison with Komen: the association of a particular product with Komen's cause seems less 'tight' than with Red, meaning that the Komen corporate partners seem generally to let the ribbon speak for itself rather than put out advertisements aimed at encouraging consumers to buy pink. While further research is required, this distinction may be due to the fact that most of the licensing agreements the foundation enters into are not category-exclusive, so there may be less of an incentive for the corporate partners to produce advertising specifically for the Komen cause because they would be advertising for the (direct) competition, as well as themselves. Note, however, that there is a risk for the Partners that, while some might invest a large amount of resources on marketing the brand, others might free-ride on those efforts.

43. *Bobby Shriver of (RED) Named 2007 Advertising Person of the Year,* BUS. WIRE, Sept. 24, 2007, *available at* http://www.allbusiness.com/medicine-health/diseases-disorders-immune-system-aids-hiv/5280666-1.html ("Not only is the (PRODUCT) RED initiative a stroke of marketing brilliance that resonates with millions of consumers and all of us in the international advertising and marketing communities, but Bobby himself is a shining example of how personal commitment can be translated into demonstrable, effective results to support those suffering around the globe.").

44. *See* Red FAQ's, *supra* note 9 (follow the "How does (RED) work" link) (stating that Partners pay a fee for (Red)'s licensing services); CEO Phone Interview, *supra* note 5.

the campaign, like "Buy Red. Save Lives," securing publication sponsorships, such as the Africa Issue of the popular magazine, Vanity Fair (2007) organizing one-off Red events like art auctions and concerts or concert series, and ensuring that there is visual (and conceptual) harmony across the Partners' advertising efforts. The Persuaders is also heavily involved in packaging and explaining the Red concept through documents like the Red Manifesto[45] or the Red Idea.[46]

As mentioned, donations[47] to the Global Fund do not flow from or through the Persuaders itself; instead, they flow directly from the Partners to the Global Fund. Thus, the Partners are the donors, while the Persuaders serves the function of a fundraising coordinator: the Persuaders identifies the corporate Partner-donors[48] and introduces them into the exclusive "Red Family"[49] by publicizing their membership and adding them to the website (e.g., including their print and video advertisements, links to their Red products, and coverage of their products). The Persuaders also helps the Partners ramp up marketing efforts around the various holidays,[50] arranges venues for carrying out the sale of Red-only items sourced

45. HBS, *supra* note 1, at 12.

46. The Red Idea, *supra* note 6.

47. Note that these amounts may not in fact be counted as donations in the traditional sense, meaning that they might be counted by the Partners not as tax-deductible charitable gifts, but rather as tax-deductible marketing expenses on which there is no cap, in contrast to gifts. However, this distinction does not have any effect on the Red business model.

48. According to Julia Cordua,Vice President of Marketing for Red in 2007 (when many of the licensing agreements were entered into), the Partner selection process takes time: "If there's a fit, that partner becomes RED . . . . That's why we're growing slowly. We don't want to get too big." Spethmann, *supra* note 24.

49. As an example of the family analogy, see the addition of the special edition Channel Island surf boards at (Blog)Red, http://blog.joinred.com/2009/12/now-you-can-save-lives-by-catching.html (Dec. 23, 2009) (welcoming Channel Islands to "the (RED) family").

50. See *A Valentine's Day Message from Erin O' Connor*, MARIECLAIRE.CO.UK, Feb. 12, 2010, http://www.marieclaire.co.uk/news/lifestyle/442450/a-valentine-s-day-message-from-erin-o-connnor.html (last visited Mar. 10, 2010); (RED) on LXTV for Valentine's Day, http://www.youtube.com/joinred#p/a/u/0/jKIi_S5P264 (last visited Mar. 10, 2010), for an example of some of the media events around Valentine's Day 2010.

from the different Partners,[51] and participates more generally in the launch of new Red items in the media.[52]

The Persuaders is also responsible for coordinating the charitable aspect of the model: It negotiates the pledges on the Fund's behalf, as described above, and ensures that the moneys flow to the Global Fund as agreed in the licensing agreements. Indeed, the Persuaders receives statements from the Global Fund detailing the amounts flowing in from the Partners and has contractual rights to audit the Partners to verify that the pledge obligations are met.[53]

It is worth re-emphasizing that the Global Fund does not pay anything, either to the Persuaders or to the Partners for working on its behalf. Rather, the Red model provides the Fund with a system for allying itself with big corporate names that support both its grant-making efforts (by way of direct contributions) and its awareness-raising work (by way of "free" advertising) without increasing costs to the fund.[54] This is extremely advantageous for the Global Fund, which had struggled to engage the private sector prior to the creation of Red; indeed, even though the Global Fund was established and advertised to the world as a unique public private partnership, the donations it received from the private sector were limited prior to the establishment of Red, amounting to around $5 million after almost three years of operation.[55] The Red initiative, however, has excelled at securing corporate support, and

51. The Persuaders also organizes sales events in Times Square, setting up a (RED) store that is devoted to selling only Red items produced by the Partners. *First Timers*, BIZBASH, Dec. 11, 2008, http://www.bizbash.com/newyork/content/editorial/13759_reebok_product_red_and_pandg_introduce_holiday_pop-ups.php (last visited Mar. 10, 2010).

52. For an example of media attention surrounding a Red product launch, see FLOWE(RED), In the News, http://www.flowered.com/flowered-in-the-news (last visited Mar. 10, 2010).

53. CEO Phone Interview, *supra* note 5.

54. Email from Global Fund Partnerships Officer (Oct. 9, 2009, 4:01am), (on file with author) [hereinafter Oct. Global Fund Partnerships Officer Email] ("The Global Fund [sought] to leverage (RED)'s key area of expertise. (RED) and its partners contribute marketing and communications competencies of the very best quality to be found in the commercial sector globally. The Global Fund and implementing partners provide a grant-making and management capability with transparency and accountability mechanisms required to build a firm foundation for (RED)'s public advocacy.")

55. HBS, *supra* note 2, at 6.

in its four years of existence has generated over $145 million in private contributions for the Global Fund to finance grants aimed at fighting AIDS in Africa.[56] This makes the Red partnership the Fund's fifteenth-largest single contributor.[57]

Red was established in negotiation with the Global Fund to fill the gap in donations from the private sector.[58] The Fund could have internalized the Red label, entered into licensing agreements with the co-venturers directly, and received the licensing fees directly;[59] instead the Fund delegated that negotiation and partnership management function to Red. This is likely in part because Red has the professional resources necessary to carry out that function, and in part because this structure keeps the Global Fund's overhead expenses contained.[60] Indeed, because Red is independently funded through the licensing fees paid out by the Partners, the Fund can keep its overhead expenses low while collaborating in and benefiting from a partnership that generates significant amounts of capital.[61] In short, Red is a mechanism for

56. Cause Marketing Forum Teleconference, *supra* note 19, at minute 45; Ron Nixon, *Bottom Line for Red*, N.Y. TIMES, Feb. 6, 2008, *available at* http://www.nytimes.com/2008/02/06/business/06red.html. This total was more than that of Russia and China in 2007. *Id.*

57. Nixon, *supra* note 58.

58. Email from Global Fund Partnerships Officer (Oct. 14, 2009, 3:50am), (on file with author) ("(PRODUCT)RED was created in negotiation with the Global Fund"). Recall that private contributions to the Global Fund were limited prior to the launch of Red, which was "created to engage the private sector in the fight against AIDS in order to deliver a sustainable flow of funds to the Global Fund to Fight AIDS, Tuberculosis and Malaria and to raise public awareness about HIV and AIDS in Africa." http://www.theglobalfund.org/en/privatesector/red/?lang=en.

59. This approach may have generated more by way of revenue for the Fund and resulted in more control over the brand, the pledge terms and the social commitments, among other things.

60. Oct. Global Fund Partnerships Officer Email, *supra* note 54.

61. *See* Lisa Ann Richey & Stefano Ponte, *Better (RED) Than Dead: 'Brand Aid,' Celebrities and the New Frontier of Development Assistance*, 19 (Danish Inst. for Int'l Stud., Working Paper 2006/26), *available at* http://www.diis.dk/sw47287.asp#516_32827 ("Product RED fits the aspirational model of delivering aid efficiently and with a lean and flexible structure . . . . The Global Fund, which prides itself of having overhead costs of only 3 percent, . . . notes explicitly that 'the agreements with RED and its partner companies do not add significant administrative work for the Global Fund or its recipients, ensuring that the funds raised go where they are needed most."); Press Release, The Global Fund, The Global Fund Welcomes Product Red (Jan. 26,

the Fund to outsource a significant portion of its private-sector fundraising efforts.

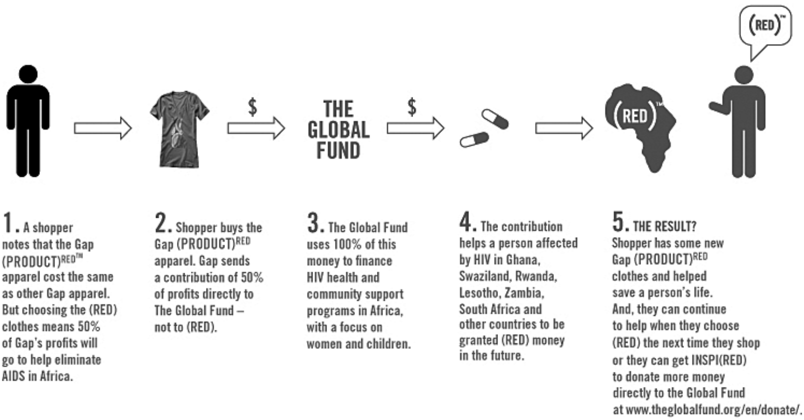
II. The Red Consumer Experience

A. *Buying Red*

This section describes how consumers experience the Red campaign both as shoppers and as citizens interested in supporting a good cause. It seeks to highlight some of the ways in which the Red experience can create confusion among consumers, particularly with respect to setting expectations for the degree of charitable impact or benefit achieved through the purchase of a Red-labeled item. The chart in Section I tells the financial and contractual story of Red. Much of this information is not easily available to consumers, either from the Persuaders or from the Partners.[62] In fact, consumers have good reason to think that the fight against AIDS in Africa begins not with a financial arrangement between a charity and a range of for-profit enterprises, but rather, simply with their making a choice to buy Red. Below is the visual aid Red uses on its website to explain how Red works, which clearly identifies the consumer as the first actor on the scene:

2006), *available at* http://www.theglobalfund.org/en/pressreleases/?pr=pr_060126 (stating that (RED) will not add significant administrative work for the Global Fund).

62. Some of the features of the arrangement, like the fact of the licensing fees and limited information about the Persuaders, LLC, are certainly available from the Red website, and quite a bit can be obtained from news reports. However, a comprehensive explanation of the model is hard to come by.



Clearly, a lot is omitted from this depiction of the model, including the licensing arrangement and the category-exclusivity feature; the social and environmental history of the product is also left unexplored.[63] This incomplete telling of the Red story does not necessarily pose a problem; consumers may not need or want to know every step of how the sausage is made, so to speak.[64] As discussed in more detail below, however, concerns arise around the questions: to what extent is consumer behavior influenced by a lack of information or mistaken assumptions about a product's financial and social history, or about a product's future charitable impact? Simply put, how do consumers differentiate between Red and non-Red, and on what basis? The answers are relevant because where there is a mismatch between consumer expectations concerning the charitable impact of their purchasing decisions and reality,

63. In reference to an older CRM campaign involving Procter and Gamble's Pampers and a charity for terminally ill children called Give Kids the World, one *Ad Age* author noted, "Somehow, over the past decade, the industry and the consumer have come to accept, even embrace, various kinds of cause marketing . . . . Nobody seems troubled that the supposed corporate philanthropy isn't philanthropy at all; it is a licensing agreement." Inger L. Stole, *Philanthropy as Public Relations*, 2 INT'L J.COMM 20, 21(2008).

64. *See* Panel 2 Symposium presentation by Dennis Whittle via webcast, panel 2, minutes 9:45-10:50. at http://iilj.org/research/FDCProgram.asp. For an extensive critique of unbridled or "naked transparency," see, "Against Transparency: The Perils of Openness in Government" by Lawrence Lessig at http://www.tnr.com/article/books-and-arts/against-transparency?page=0,3.

consumer protection is put at risk and, with it, public trust in philanthropy generally.[65]

Red items[66] can be purchased either at Partner stores or from their websites.[67] The Red website links to the products and to the Partner websites. Labeled items cannot be purchased directly from the Red website as, again, none of the funds generated through consumer purchases go through Red, and contributions are transferred directly by the Partners to the Global Fund. The site does however provide a tool for measuring the impact of a particular purchase called the "Impact Calculator."[68] Starting from the premise that two ARV pills per day can dramatically increase an AIDS patient's life expectancy, and that this amounts to an expense of 40 cents per day, this device allows site visitors to view the number of days of medication that can be bought by purchasing a particu-

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65. An example of a recent philanthropic scandal is the outcry against the Red Cross for using funds donated in the aftermath of September 11th for worthy causes that were unrelated to that incident. *See, e.g.*, Jamie Holguin, *Red Faces at the Red Cross*, CBS NEWS.COM, Jul. 30, 2002, http://www.cbsnews.com/stories/2002/07/30/eveningnews/main516886.shtml. A similar controversy involved Haitian musician Wyclef Jean's Yele Foundation, in which allegations surfaced that Wyclef used moneys donated to the charity for personal gain. Susan Kinzie, *Wyclef Jean's Yele Haiti Foundation Under Fiscal Scrutiny*, WASH. POST, Jan. 16, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/01/15/AR2010011504024.html.
Whether or not these allegations are proven, a few important points emerge: (1) The public responds when charities—especially celebrity-backed or widely reputed—do not act as they should, particularly in the context of humanitarian emergencies—a simple Google search for Yele scores hundreds of articles about the controversy; (2) these occurrences create a sense of deception and suspicion around charity generally—and spur the production of lots of information about what organizations that are deemed 'safe' or 'unsafe' to give to. Another example is the viral response to a Center for Global Development blog entry concerning Kiva, the microfinance portal, which exposed certain key aspects of Kiva's financing structure that weren't immediately apparent to lenders. David Goodman, *Kiva Is Not Quite What It Seems*, Center for Global Development, Oct. 2, 2009, http://blogs.cgdev.org/open_book/2009/10/kiva-is-not-quite-what-it-seems.php.

66. Note that "[m]aking the products the color red is not a requirement; however some products are red in color. All will bear the (product/brand)RED logo." Red FAQs, *supra* note 9.

67. Access varies widely from Partner to Partner, with some selling Red products in different parts of the world and others limiting availability to certain countries or cities. Ponte et al., *supra* note 20, at 309.

68. (Red), Impact Calculator, http://www.joinred.com/Learn/Impact/Calculator.aspx (last visited Mar. 10, 2010).

lar Red item. For example, the purchase of a Red Nano "can provide more than 23 days of life saving ARV treatment"; nine purchases made with the Starbucks card "can provide 1 day"; and the purchase of a Dell mini-laptop "can provide 11 days."[69]

The Impact Calculator page displays only the converted amounts, listed in number of days of medication. It does not indicate the dollar amount that makes its way to the Global Fund as a result of buying a Red-labeled item. A few simple reverse calculations reveal that if a $28 dollar t-shirt (marked with a commitment to transfer "up to 50% of the profits to the Global Fund") can provide up to nine days of medication, $3.60 will make its way to save lives in Africa. According to this same calculation it appears that Apple gives close to $10 per Nano sold. Empirical research is needed to determine whether these dollar amounts meet consumer expectations of a charitable return on their investment. It is at least conceivable that at a certain ratio of profit to charitable contribution, consumers would opt to buy a cheaper item (at H&M rather than The Gap, for instance) and simply donate the difference (or more) to charity.[70]

The argument can be made that any contribution is a positive. And yet, if the charitable impact is small, disappointment and frustration can ensue. Even where no premium is charged and where no direct contribution is solicited, consumers who are asked to make purchasing decisions to support a charitable cause feel used when it turns out that the charitable

69. *Id.*

70. When this paper was presented at the Privatization of Development Assistance Symposium on Dec. 4, 2009, a woman approached the author to say that the presentation was useful to her, as someone with limited disposable income who is not in a position to make outright charitable donations. She explained that for her, initiatives like Red are appealing because they invite her to meet her own needs, while helping others meet theirs. However, upon finding out that the actual amount set aside for charity was smaller than she expected, she felt deceived and disappointed. The category-exclusivity feature aggravates this problem because, while consumers do not technically pay a premium for a Gap Red t-shirt over a non-Red t-shirt (though the former is in fact more expensive because of higher production costs), they do pay a premium to buy Gap over cheaper clothing retailers. To the extent they make the retailer choice based on the affiliation with a good cause (which is what the Partners bank on when they elect to join Red), there is a consumer protection issue.

outcome is in fact limited.[71] Thus, one barometer in the pledge negotiation process with the Partners is the "common sense test": If a pledge is below a certain dollar amount or percentage would strike consumers as ridiculous or offensive, the Persuaders recommend increasing it,[72] in order to protect the legitimacy of the program generally.

Given that each Partner negotiates its own charitable contributions, the Red label alone (without more specifics concerning Partner commitment) does not indicate what percentage or amount is designated for charity. A product-specific inquiry is necessary to determine the charitable impact of each Red purchase. In this regard, the Partners are inconsistent in how they communicate to consumers what percentage or dollar amount of the sale price will make its way to the Global Fund. For instance, Starbucks has separate stands that display only Red items, such as tumblers, Africa-grown coffee beans, and water bottles. The displays draw attention to the Red items and clearly indicate what dollar amount of each purchase will go to the Global Fund and toward fighting AIDS in Africa. In contrast, Apple stores display Red IPod Nanos in a line-up of other Nanos of different colors. Apart from inserting the Red logo into the written description of the item, there is no additional information about the Red campaign, either with respect to AIDS in Africa or the Global Fund. Additionally, Apple provides no indication whatsoever as to what share of the purchase price will be donated to charity. This inconsistency of practice among the Partners is problematic because consumers might assume that a higher percentage of the sale price is designated for charity than is actually the case.

B. *If it isn't charity, why does it feel like it?*

Red (along with many other CRM initiatives) has the potential to confuse consumers because it draws an unclear and shifting line between commerce and philanthropy and between charitable acts and shopping. Mantras like "Buy Red. Save Lives" and "Do the Red Thing" send a clear message that buying Red-labeled products is a sure way to help people who

71. Phone Interview with Grant La Rouche, I do Foundation Executive Director, Grant La Rouche, (Feb. 9, 2010, 3:00pm) (notes on file with author).

72. CEO Phone Interview, *supra* note 5.

are in need and, by extension, to become a better world citizen. The campaign is aimed at changing consumer habits, not formally (in terms of how much or what you buy), but substantively (what kind you buy),[73] on the premise that this shift can make a real difference in the world. The first sentence of the Red "Manifesto" is: "As first world consumers, we have tremendous power. What we collectively choose to buy, or not to buy, can change the course of life and history on this planet." It closes with, "All you have to do is upgrade your choice."[74] In short, the campaign is both launching and responding to a call for a new kind of conscientious, compassionate, and ethical consumer, one who makes deliberate and informed purchasing decisions and keeps public welfare in mind. Red expands choices and preserves Western consumption and lifestyle habits, while simultaneously creating the possibility of alleviating suffering in a different part of the world.

At the same time, however, Red makes a strong push to view the choice to purchase Red items over non-Red items as incidental: Red is structured to ensure that labeled products are generally completely equivalent to non-labeled items in terms of price, function, and quality, to the point of being mistakable for one another. Thus, in answer to the question, "How will consumers know what is (RED) and what isn't?" the website highlights: "we believe that some people will buy (PRODUCT) RED products without even knowing what (RED) is about or without even knowing what the positive impact they've just made on the lives of those with HIV and AIDS in Africa."[75] And in answer to the question, "Do Red products cost more?" the website explains: "No, they do not. The point of (RED) is for the partner company to contribute money to the Global Fund by sharing a portion of its profit to help people affected by AIDS in Africa. This is a key aspect of the consumer proposition. The company pays extra—the purchaser does not."[76]

Red toes a difficult line because it aims to inspire and mobilize consumers to think and act charitably by 'Buying Red'

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73. This can also be described as changing the emotional underpinnings of purchasing decisions.

74. HBS, *supra* note 2, at 12.

75. Red FAQs, *supra* note 9.

76. *Id.*

without turning them into actual donors. For the consumer, this can be confusing in so far as it is neither clear what is being asked of them, nor what the consequences are of acceding to this request. Consumers are called upon to make purchases that are meaningful and important because they will "save a life." Yet they are also being told that their purchase does not actually constitute a charitable act. As highlighted in the frequently-asked-questions section of the Red site: "Remember, giving isn't the reason to buy a (PRODUCT) RED product. It is simply built into the product and the act of purchasing these products."[77]

Thus, while a Red purchase may help charity indirectly, it is no substitute for an actual charitable donation. As the above quotes illustrate, some effort is made to encourage consumers to distinguish between giving and buying. Additionally, the campaign seeks to spread the word that "(Product) Red is *not* a charity. It's a business model."[78] However, these distinctions may not be conceptually or emotionally obvious to the average consumer.[79] As a result, consumer protection issues arise:

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77. *Id.* Bobby Shriver himself differentiates philanthropy from compassionate consumption and encourages those interested in donating to a cause to do so *outside* of Red: "If you want to make a charitable contribution, don't go to the Gap. Write a check. But if you want an Armani watch, go get your (RED) Armani watch. And $30 will buy AIDS medicine." HBS, *supra* note 2, at 9. Echoing the same message but from a critical stance, two authors reframe the Red proposition to emphasize their own understanding of the consequence of buying Red: "Contrary to the (RED) manifesto, as consumers we cannot change the course of history on the planet . . . . So buy (RED) because you like the products and not because you are trying to promote global health." Colleen O'Manique & Ronald Labonte, *Rethinking (Product) Red*, 371 THE LANCET 1561, 1562 (2008). Note that the *Lancet* had previously donated an entire issue to the cause of AIDS in Africa in support of Red and pledged $30,000 to the cause. *See* Editorial, *The Business of HIV/AIDS*, 368 THE LANCET 423, 423 (2006) ("For the first time in its 183 year history, this week's issue of The Lancet is black and white and (RED) all over.").

78. Red FAQs, *supra* note 9 (select "Is RED a charity?" link). Note that in 2006, the language was: "Product Red is not a charity. It's a commercial enterprise (. . .) ." One could query whether the term "business model" was later selected to replace "commercial enterprise" because it was viewed as being more palatable to consumers.

79. *See* Kwangmi Ko Kim & Lauren Ambrogio, Presentation at the the Association for Education in Journalism and Mass Communication 2008 Convention: INSPI(RED) or (RED)ICULESS? The Assessment of the (PRODUCT) RED Campaign (Aug. 2008), 22-23, *available at* http://www.allacademic.com/meta/p_mla_apa_research_citation/2/7/1/7/1/p271717

when consumers are called upon to shop compassionately and make their purchasing decisions in response to the call—which is, after all, what cause-marketing aims to achieve—they can feel confused and even deceived if and when there is a mismatch between their anticipated (desired) impact and the actual impact.[80] The question of where profit ends and philanthropy begins is of crucial importance because it cuts deeply into public trust in philanthropy. Where the line between profit and charity is difficult to discern, both consumer protection and philanthropy step onto shaky ground.[81]

III. ISSUES OF EFFECTIVENESS ASSESSMENT AND ACCOUNTABILITY

A. *Effectiveness*

Certain features of the Red model raise concerns with respect to assessing the campaign's effectiveness. When it comes to the relationship between the Red partnership and the Global Fund, it is important to note that the former receives special treatment. Ordinarily, members of the public can see how much *each* government or private actor contributes to the Fund and how much those contributions have increased or de-

_index.html ("the marketing team of the (PRODUCT)RED campaign clearly stated that this campaign is not a charity to benefit the cause, and it is a business model to sell the (RED) brands. However, the messages that are prominently conveyed contain strong and emotional political messages about acting on charity while minimizing their selling intentions. Such approaches can mislead the consumer to believe that commercial transactions are necessary to act on good causes."). It is helpful to contrast Red with another business initiative called Working Assets, a phone service that contributes 1 percent of all its subscribers' monthly charges to a set of charities that it selects and screens. Subscribers do not pay a premium for this service. Working Assets, About Us, http://www.workingassets.com/About.aspx (last visited Mar. 10, 2010). It is clear in the company's marketing that it is a for-profit business that is 'giving back.' Since 1985, $65 million has been donated. *Id.* The company is also involved in advocacy, stating "[e]very month, our members generate over 80,000 calls, letters and e-mails to Congress, the White House and corporate leaders regarding decisions of critical public concern." *Id.*

80. Watch http://www.youtube.com/watch?v=oclbf9f-L5o for an example of where the lines between philanthropy and consumption become difficult to discern.

81. *See supra* note 65 and accompanying text (referencing Red Cross, Wyclef Jean and Kiva philanthropy scandals).

creased over time.[82] Disclosing contributions in an aggregate, to-date figure, as Red does, rather than a per-partner/per-year figure is inconsistent with the Global Fund's usual practice. Not having access to this information for each category-exclusive Partner means that consumers who make the choice to buy Red have no way of knowing how successful or effective a given Partner is at generating donations. This matters in turn because the decision to buy Red over non-Red may be influenced by an expectation about the charitable commitment and impact of a particular Partner in terms of raising money for the Global Fund.[83]

Another issue with disclosing the contributions only in the aggregate is that it makes it harder to assess the effectiveness of the Red model overall. The model's multi-year fundraising structure is touted as being financially innovative and effective in part because it is designed to be "sustainable," meaning that it is intended to provide a steady source of financing to the Global Fund.[84] The Persuaders could have solicited donations from the Partners and given them rights to append the Red label to their products without integrating the label into Partner product lines or linking contributions to sales figures. Such a model would have been attractive to the Partners for similar reasons as the Red model: it can increase collateral sales,[85] brand loyalty,[86] and employee retention.[87]

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82. The Global Fund, Pledges and Contributions, http://www.theglobalfund.org/en/resources/?lang=en (last visited Mar. 10, 2010).

83. This works in both directions: Red celebrates that the partnership has raised over $140 million for the Global Fund and that this money has saved many lives by communicating a simple message: 'It's working. Let's keep at it!' This keeps consumers engaged and committed to helping. Conversely, where the figures are not impressive, or not impressive enough, consumers might feel discouraged and less committed to participating. This is in part why the *Advertising Age* article concerning how much was spent on marketing versus how much was raised for charity (*supra* note 36) caused such a stir: it threatened to weaken the Red brand.

84. *See* HBS, *supra* note 2, at 1 (Bobby Shriver's statement that "[w]e couldn't just promote the idea of (RED). We had to make sure the products were compelling and that they sold. To be sustainable, our partner companies had to make money. To keep (RED) vibrant for the long haul, it had to be good for the Global Fund *and* profitable for the businesses involved.").

85. *See* Shriver, *supra* note 37 (stating that "the partners benefit from the foot traffic into their stores. It would be hard to believe that nobody bought other products when they entered the Gap to buy a Red product. Perhaps someone also picked up a sweater at the Gap when he purchased his Red

However, because this alternative model would generate fixed, non-continuous contributions, it might have limited the campaign's effort—and the Partners' incentives—to secure an ongoing source of revenue to battle AIDS in Africa. AIDS treatments must be administered on a long-term basis, and continuous supply of ARV medication is crucial; as a result, fixed, non-continuous donations are viewed as being ill suited to the task.[88] Thus, the Red founders determined that the better approach was to establish multi-year co-venture arrangements between the Partners and the Global Fund. They also added an important twist: the Partners can design and market products specifically for the Red line.[89] In this way, Red be-

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jeans. Perhaps when someone else bought a Red Nano, she also got a case for it.").

86. Berglind & Nakata, *supra* note 31, at 6 ("Studies have shown that consumers have more favorable attitudes toward brands that are tied to a cause than those that are not . . .. . The idea that the company is giving back to the community strengthens customer loyalty and elevates sales.").

87. *See* McKinsey & Co., The State of Corporate Philanthropy: A McKinsey Global Survey (2008), *available at* http://www.mckinseyquarterly.com/The_state_of_corporate_philanthropy_A_McKinsey_Global_Survey_2106 (finding that 42 percent of respondents state that their corporate philanthropy programs' goals include increasing employee recruitment or retention; note that this survey was not specific to Red); Cone, Past. Present. Future. The 25th Anniversary of Cause Related Marketing 17 (2008), *available at* http://www.coneinc.com/stuff/contentmgr/files/0/8ac1ce2f758c08eb226580a3b67d5617/files/cone25thcause.pdf [hereinafter Cone 2008] (studying employee engagement based on various company-offered opportunities).

88. *See* Jeremy Youde, *Ethical Consumerism or Reified Neoliberalism? Product (RED) and Private Funding for Public Goods*, 31 New Pol. Sci. 201, 202, 205, 213 (2009).

89. Many Red Partners (including Converse, Nike, The Gap and Starbucks) issue specific Red products, unlike others such as Apple, whose Red Nano is identical to other Nanos, save the color. *See, e.g.*, Converse, (Product) RED Shoes, http://www.converse.com/#/products/shoes/red/106128F (last visited Mar. 10, 2010); Nike, Lace Up Save Lives, http://www.nike.com/nikefootball/red/home?locale=en_US (last visited Mar. 10, 2010); Gap, (Product) RED, http://www.gap.com/browse/division.do?cid=16591&tid=gpvan011 (last visited Mar. 10, 2010); Starbucks, (Starbucks) RED, http://red.starbucks.com/red/default.aspx (last visited Mar. 10, 2010); Apple, (iPod Product) RED, http://www.apple.com/ipod/red/ (last visited Mar. 10, 2010). Other co-venture models sell a single identical product at a number of different locations. Ethos Water (acquired by Starbucks in 2005), for example, directs 5 cents per bottle to water relief projects in the developing world. Jonathan Greenblatt, *Building a Better (RED),*

comes fully integrated into the Partners' product lines as well as their bottom lines; the more Red is bought and sold, the more funds can go toward fighting AIDS.[90]

Despite the emphasis on sustainability in the Red model, however, it must be highlighted that a sizable chunk of the impressive $145 million raised to date came not from this innovative commercial co-venture arrangement, but rather from of a traditional fundraising device: a much publicized, one-time art auction.[91] On Valentine's Day 2008, Red, Sotheby's, and the Gagosian Gallery, co-orchestrated an auction that featured over sixty artists, including Jeff Koons, Chuck Close, and Damien Hirst, who donated their works. In a single night, the campaign raised over $42 million—compared with the $60 million donated by all of the Partners in almost two years since Red's launch.[92] This fact raises questions about the advantages of raising charitable funds through a "sustainable" business model rather than through more conventional fundraising.[93] Additionally, because the contributions to the Global Fund are disclosed only in the aggregate, it is difficult to parse out what portion of Red revenues are produced by the model itself and what portions come from one-time sources, like fundraisers, concert events, or even individual donations, such as

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WORLDCHANGING, Oct. 31, 2006, http://www.worldchanging.com/archives/005150.html (where a single identical product was sold at a number of different places).

90. The Partners "have an interest in seeing the product succeed because more sales of Product (RED) products means more donations to the Global Fund *and* more revenue to the businesses themselves." Youde, *supra* note 88 at 205. Another reason to support this tack is that, in many cases, CSR initiatives are of interest to shareholders mostly in so far as they increase the bottom line. Berglind & Nakata, *supra* note 31, at 6. Introducing a CSR initiative that not only carries reputational benefits but also fits into existing business practices is therefore especially appealing to shareholders and helpful for securing their buy-in. Ponte et al., *supra* note 20, at 312.

91. Laura Starita, *The Global Fund Not Seeing Red*, PHILANTHROPY ACTION, Apr. 29, 2008, http://philanthropyaction.com/nc/the_global_fund_not_seeing_red/ (describing the auction and stating that charity auctions are "one-time fundraising tactics used frequently by nonprofits to benefit a cause. What they aren't are replicable business practices, nor are they stable, sustainable sources of cash.").

92. Ponte et al., *supra* note 20 at 312

93. *See* Starita, *supra* note 91 (using the auction to highlight problems with the Red model's actual impact).

those made by visitors to the Red website—which also appear to count as Red contributions.[94]

B. *Accountability*

The Global Fund's usual practice of reporting contributions on a per-donor/per-year basis allows for an important kind of accountability, because the public can see whether governments meet their pledge amounts and how much each country or private donor contributes in any given year and over time, which can in turn stimulate donations. The Red model's departure from the Global Fund's usual reporting practices might compromise the fund's strong reputation for transparency generally.[95] In contrast to the Global fund, Red, or more specifically the Persuaders, discloses nothing about its earnings (the licensing fees that sustain the enterprise) or about its costs structure (salaries, marketing and operating expenses), and very little is known about the day-to-day business and ownership structure.[96] In other words, by allying itself

94. *See* (Red), The Global Fund, http://www.joinred.com/aboutred (select "The Global Fund" link) (last visited Mar. 10, 2010) (providing links to both the Global Fund and the U.N. Foundation's donation page); Youde, *supra* note 88, at 213.

95. *See* J. BENDELL ET AL., LIFEWORTH, *Inspi(red) Marketing or (RED)wash*, *in* THE EASTERN TURN IN RESPONSIBLE ENTERPRISE: A YEARLY REVIEW OF CORPORATE RESPONSIBILITY 5 (2009), *available at* http://lifeworth.com/lifeworth2008/2009/05/inspired-marketing-or-redwash ("[The Global Fund] has unrivalled levels of transparency on matters other than corporate engagement"); Red, Flow(Red) FAQ, http://www.flowered.com/faq (last visited May 19, 2010) ("The impact and progress of Global Fund-financed programs has been possible because of its unique approach. Through its small staff and efficient systems, the Global Fund has administrative costs of less than three percent of all the money contributed to it, ensuring that the vast majority goes directly to support life-saving work in poor countries. (100% of (RED) money is put to work on the ground in Africa; no overhead is taken from these funds.) In addition, the Global Fund's performance-based funding model holds its recipients to strict standards, only releasing money if programs prove that they are achieving strong results and shutting down those that do not spend money effectively. A key aspect of the performance-based model is the oversight of the transparent and effective use of funds. . . . As a result, a donor to the Global Fund, whether a private citizen or a government, can be confident that their contribution will rapidly have an impact on the lives of people in need.").

96. The Persuaders does not have a website and, as a limited liability company incorporated in Delaware, it is under no obligation to make any of its corporate documents publicly accessible.

with Red, the Global Fund may have put itself in a position of having to alter its commitment to transparency in order to accommodate and benefit from the Red model.

In the frequently asked questions section of the Red website, the words "accountability" and "transparency" appear fairly frequently, but the terms are attached to the Global Fund, rather than to the Partners or the Persuaders, or the Red campaign generally.

It becomes important to ask: accountability to whom and for what? The members (or owners) of the Persuaders and its Board of Directors are one source of accountability, as they have decision-making power concerning Red and are invested in its success.[97] These particular individuals are likely primarily concerned with how much money is being raised through the Red model for the Global Fund and will push for changes to be made where the brand falls short in accomplishing its mission.[98] However, if this model were replicated—and if, rather than having Bono and other public figures (who would be harmed by a scandal) at the helm, there were less well-known participants who are more interested in profiting from the enterprise—might the barometer for accountability (advancing the cause) change or suffer? How do the duties of charity boards of directors change or expand when CRM or co-venturing initiatives come into play? Do regulators, whose role it is to protect consumers and charities from confusion, deceit, and fraud, have a stake in mitigating this risk?

As far as accountability within Red, provisions in the Red-Partner agreements allow for removal of a Partner from the partnership if the company becomes the subject of a scandal that could damage the Red brand.[99] Another accountability source is the Partner shareholders. If Red items are unprofita-

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97. CEO Phone Interview, *supra* note 5.

98. *See, e.g.*, William Easterly, *Product (RED): from ridicule to dialogue*, AIDWATCH, Jan. 28, 2010, http://aidwatchers.com/2010/01/product-red-from-ridicule-to-dialogue/ (reporting a meeting with Shriver about how to improve Red). This openness may reflect well on the individual, but not necessarily on Red's structure or model. A similar openness was displayed by Susan Smith Ellis in a phone interview where she explained that Red, being a young brand, still has a lot of learning to do, and that their way of doing business will continue to evolve going forward in order to maximize the brand's ability to fight AIDS in Africa. CEO Phone Interview, *supra* note 5.

99. CEO Phone Interview, *supra* note 5.

ble or if the Red brand suffers reputationally and Partners' images are affected, or if the endeavor otherwise fails to raise the double bottom line,[100] shareholders can vote to leave the partnership (as Motorola and Windows have done) or simply sell their shares.[101]

On the public or consumer side, authors Ponte and Richey argue that accountability comes in large part from Bono himself.[102] Because celebrities "act as a bridge between development assistance, organizations and corporations," celebrities "provide a basis of legitimacy to both aid's goals and corporations' profits" and "guarantee in their personal capacity its management, the seriousness of the target, the feasibility of the solution, and its cool quotient."[103] The other source of public accountability for Red is the Global Fund itself. As mentioned above, the Fund is reputed for being highly transparent and effective. This is certainly an asset for the Red partnership as it lends legitimacy to the campaign overall. Thus, where Red fills the Global Fund's private-sector financing gap, it could be that the Global Fund and Bono fill Red's accountability gap.

100. The double-bottom line is defined as "making money and helping a charitable cause at the same time." INDEX, *supra* note 11, at 6.

101. Red CEO Susan Smith Ellis explained that as the Red brand is still young, the learning curve remains steep, and determining what items profit from being labeled Red is an ongoing process. CEO Phone Interview, *supra* note 5. Evidently, products like cell phones and computer programs may not be the right items to "turn Red", perhaps because these items, unlike t-shirts, Nanos, sunglasses, and so on, are not bought at Partner stores but rather at retailers like Best Buy or phone company dealerships, which sell many brands and can be less conducive to fostering customer product or brand affinities (buying Red may not be as compelling to consumers in this setting). Additionally, retailers cannot be expected to do much by way of promotion for Red items.

102. *See* BENDELL ET AL., *supra* note 95 ("One person working on the project told the lead author of this review that the participating companies can pull out of the scheme if Bono is not involved in the future. If the Fund's projections are correct, then this would mean that in the future almost 10% of the Fund's work would depend on the interest and health of one rock star. People and institutions change over time, for better or worse, and so systems should be 'future-proof'. A lack of transparency means concerned people cannot check these issues.").

103. Richey & Ponte, *supra* note 61, at 22

IV. Critical Views of Red and Cause-Related Marketing

The views laid out in this section serve a dual purpose: They raise questions about the Red campaign specifically, and, more generally, they raise questions about the effectiveness and social implications of CRM as a tool for financing charitable work. The aim is to highlight ways in which programs that partner businesses with charities, blending commerce and philanthropy, can undermine the goals advanced by those charities, on the one hand, and create inflated expectations among consumers of the true effect of their charitable decisions, on the other. Whether these criticisms are empirically grounded is a question that merits further research, because the issues raised are serious, particularly in the context of a growing CRM industry and in the wake of recent scandals that generate distrust of corporations and, by extension, their involvement in philanthropy.[104]

A. *"Shop so the unfortunate can live"*

One of the more virulent examples of criticisms of the Red campaign falls along the lines of what Karen Heller, columnist for the Philadelphia Inquirer, terms "Shop so the unfortunate can live."[105] This view takes issue with the proposi-

104. For example, the Bernard Madoff, John Thain, and Enron scandals (not to mention the current financial crisis) have served to severely weaken trust in the private sector. According to philanthropy consultant Lucy Bernholz, in the Madoff context, signs have begun "to appear that the wrongdoing may have extended into the philanthropic sector itself and lawsuits were being filed against some of the same funders who had reported huge losses. Estimates of the assets lost to Madoff just from the Jewish philanthropic community topped $2 billion. The damage done to the nonprofit sector's reputation and to donors' trust levels may prove to be even greater. 2010 may be the first time in which annual giving totals need to factor in funds 'clawed back' from charities as part of the recovery effort associated with the Madoff scheme." Lucy Bernholz, Blueprint 2010 16 (2010); *see also* Greenblatt, *supra* note 89 ("As corporate scandals like Enron and WorldCom are upstaged by more recent brouhahas over options back-dating and boardroom surveillance, public faith in business seems likely to diminish even further. It would take just one Eliot Spitzer to conduct an expose on companies that cook the books of cause marketing and abuse consumer trust. Such claims could inflict irreparable damage on this nascent sector and harden consumer skepticism.").

105. Karen Heller, *Buying stuff may not be best way to aid Africans*, The Philadelphia Inquirer, Mar. 9, 2007, at D1.

tion that we can shop our way to a better world (especially when overconsumption in rich countries is already viewed as a pressing problem[106]) while commodifying suffering and, by the same gesture, Africa.[107] Taking up this criticism, a Red counter-campaign called Buy Less Crap—a website launched about a year after Red in 2007—urges visitors to "Join us in rejecting the ti(red) notion that shopping is a reasonable response to human suffering." The campaign's often satirical message is simple and differs substantially from Red's: "Shopping Is Not A Solution. Buy Less. Give More."[108] The website provides links to over thirty charities, including the Global Fund, and encourages making direct contributions to those entities, rather than lending indirect support via consumption.[109] This line of criticism takes issue with the conflation of

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106. Jared Diamond, *What's Your Consumption Factor*, N. Y. TIMES, Jan. 2, 2009, at A17.

107. A similar criticism appears with respect to the use of pink ribbons to brand products and raise money for breast cancer research and programs. *See* Lucinda Marshall, *Is Breast Cancer Awareness a Marketing Sham?*, ALTERNET, Jan.23, 2007, http://www.alternet.org/environment/46813 ("We are bombarded with all manner of wonderful pink things we can buy to raise money to help fight breast cancer. Everything from makeup to a line of clothing from the Ford Motor Company. Never mind that the makeup contains ingredients linked to cancer and auto exhaust contains known carcinogens, it's all for a good cause."); Ellen Leopold, *Shopping for the Cure*, BREAST CANCER ACTION NEWSLETTER (Brest Cancer Action, S.F.), Jan./Feb. 2001, http://bcaction.org/index.php?page=newsletter-63a ("What the public and the policy makers hear about breast cancer nowadays is not a political message. Applying for-profit public relations skills (and budgets) to nonprofit operations, the corporate charities have succeeded in branding breast cancer imagery. The new logos and slogans everywhere promote products for sale . . . . The emphasis on consuming as a way of raising money—shopping for the cure—trades on the most conventional expectations of women rather than on their capacity for social action. Nonetheless, the new breast cancer events are widely seen as upsetting conventions.").

108. Buy (Less) Crap!, http://www.buylesscrap.org (last visited Mar. 10, 2010); *see also* O'Manique & Labonte, *supra* note 77, at 1562 ("Contrary to the (RED) manifesto, as consumers we cannot change the course of history on the planet . . . . So buy (RED) because you like the products and not because you are trying to promote global health.").

109. Buy (Less) Crap!, *supra* note 108; *see also* Nara Schoenberg, *BUY (LESS) targets cause-related marketing*, CHIC. TRIB., Mar. 23, 2007, *available at* http://ww2.aegis.com/news/ct/2007/CT070303.html; Trent Stamp, *Product Red's New Campaign*, Trent Stamp's Take, Oct. 23, 2007, http://www.trentstampstake.org/2007/10/product-reds-new-campaign.html (stating "If you want to fight HIV/AIDS in Africa, and create awareness of the problem I

consumption with altruism and applies to other CRM initiatives as well.[110]

Red is also accused of orchestrating a high-profile marketing campaign that effectively packages Africa "for consumption by western consumers."[111] Here, Red is seen as reducing the relationship between the West and Africa to an overly simplified transactional link between wealthy developed-country consumers and an undifferentiated continent of sufferers.[112] Taking this view one step further, some critics caution that 'compassionate consumption' or 'Brand Aid' effectively de-

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have a better idea for you. Donate the $28 that you would have spent on a (2 WEEKS) T-shirt to fight HIV/AIDS in Africa to a worthy charity, thereby providing 10 weeks (or more) of care for someone who is suffering. Then, to create awareness, email everyone you know—for free—telling them of the seriousness of the problem and what they can do to be part of the solution.") (Trent Stamp is the founding president of Charity Navigator).

110. *See, e.g.*, Barbara Ehrenreich, *Welcome to Cancerland: A mammogram leads to a cult of pink kitch*, HARPER'S BAZAAR , Nov. 2001, at 43 (criticizing the 'cult' that surrounds breast cancer awareness and marketing).

111. Karina Jungar & Elaine Salo, "*Shop and Do Good?",* in 2 J. PAN AFRICAN STUD. 92, 93 (2008).

112. Kathleen Kuehn, Presentation at International Communication Association Annual Meeting: Compassionate Consumerism: Healing Africa Through Gap's Product (RED) Campaign, 12-13 (May 21, 2008), *available at* http://www.allacademic.com/meta/p234360_index.html ("RED brands Africa. This is problematic for a number of reasons. For one, it reinforces the common perception that Africa is a homogeneous, underdeveloped continent that shares a specific set of cultural values—it does not symbolize the second-largest, second-most populated continent in the world."). At the same time, Red has drawn criticism for contributing to a trend of "Afropessimism," producing associations in the Western imagination of Africa as a diseased, hopelessly underdeveloped continent that will advance only if the wealthy citizens of the Global North come to its rescue. *See, e.g.*, *Hopeless Africa,* 355 THE ECONOMIST 17 (May 13, 2000) (featuring Africa as "The Hopeless Continent"); Carina Ray, *The dangers of 'brand aid'*, THE NEW AFRICAN, Feb. 1, 2008, at 18, ("the way in which mainstream Western corporations and media outlets present Africa does little to challenge the assumption that the only the continent has going for it is the West"); Jungar & Salo, *supra* note 111, at 94 ("We argue that the 'dark continent' discourse that Red uses to mobilize consumer power hampers rather than promotes HIV/AIDS prevention and treatment efforts on the continent."). *But see* Derek Blasberg, *Gisele*, SUNDAY TIMES, Sept. 4, 2006, *available at* http://women.timesonline.co.uk/tol/life_and_style/women/celebrity/article640244.ece (arguably standing for the opposing point: Red is about fun and glamour, and depictions of people "looking miserable don't work anymore"). Whether misery or glamour is being depicted, however, the portrayal of Africa as needing help remains a prevalent theme.

links health in Africa from its "historical legacies, and the broader context within which sick bodies find themselves; a context shaped by global policies that govern trade, intellectual property, trade, and debt."[113] This suggests that by relying on glamour-infused compassionate consumption to alleviate suffering, Red in fact obscures (and enables) the very inequality and injustice-generating forces that produce suffering.[114] Accordingly, CRM serves not to challenge the socio-economic status quo that perpetuates harm (as marketed), but rather leaves the status quo intact and preserved; it is "not about change, but about business as usual."[115]

By some accounts, Red actually aggravates economic and social injustice by literally glossing over the reality that Red

113. O'Manique & Labonte, *supra* note 77, at 1562; *see also* Richey & Ponte, *supra* note, 61, at 1.

114. See Richey & Ponte, *supra* note 61, at 20, for a related critique ("Consumers are not encouraged to ask about how the products are produced, the labor conditions in the factories, the environmental consequences of resource extraction, or the human rights standards in the producing countries. Instead, they can comfort themselves with the knowledge that their (RED) cell phones make them bona fide AIDS activists. (RED), according to its critics, replaces substantive discussions and involvement in AIDS activism with celebrities and glossy magazine spreads.") *See also* Angela M. Eikenberry, *The Hidden Costs of Cause Marketing*, 7 STANFORD SOC. INNOVATION REV. 51 (2009) (arguing that consumption philanthropy hides how markets create social problems and replaces substantive, effective action with mindless buying, among other criticisms). Another related critique is expressed by author Inger Stole who argues that CRM presents "a host of troubling dilemmas . . . . Perhaps foremost, the practice of cause marketing suggests that businesses may leverage the existence of dire social problems to improve their public images and profits while distracting attention from their connections as to why these social problems continue to exist." Stole, *supra* note 64, at 21; *see also* Marshall, *supra* note 107 (quoting a breast cancer survivor as stating "I cannot adequately articulate how disgusting I find the marketing of trinkets, appliances, etc. on the backs of those of us in this battle. The contribution percentage is negligible compared to mark-up on the product. How dare they use women in this battle to line their pockets?").

115. Eikenberry, *supra* note 114, at 55; *see also* Blasberg, *supra* note 112 (quoting supermodel Gisele Bundchen as stating, "We can all start shopping more, and feel good about it. No more guilt!"); Jess Worth, *Punk Rock Capitalism?*, 395 NEW INTERNATIONALIST (Nov. 2006), http://www.newint.org/features/2006/11/01/productred/ (quoting Sheila Roche, Red's Director of Global Communications, who characterizes Red as "a way for the sinner to become saint—to spend money, but to feel good about it. Red's hip and sexy.").

items can be purchased only by a privileged few, while the targeted beneficiaries of assistance cannot even afford life's necessities.[116] Shopping to do good, bringing "Desire and Virtue. Together at Last,"[117] is simply "too easy"[118] because it focuses the consumer not necessarily on being "good" but rather, on being a "good-*looking* Samaritan."[119] It also doesn't require any sacrifice.[120] Indeed, given that Red items do not cost any more than non-Red items, and that becoming a Red consumer does not require any major shift in lifestyle or consumption habits, the campaign's feel-good factor may be unjustified or exaggerated.[121]

B. *De-Politicizing Assistance and Commercializing Philanthropy? Impacts of CRM on Notions of Civic Engagement and Giving*

One of Red's touted strengths is its potential to narrow the gaps between consumers, the cause their purchases seek to advance, and the beneficiaries of those efforts. As former Red President Tamsin Smith explained in an interview:

> Historically, governments and civil society organizations have carried the water on funding and administering public health programs, which is appropriate

116. O'Manique & Labonte, *supra* note 77, at 1562.

117. *See* Do the (RED) thing on Facebook, http://www.facebook.com/group.php?gid=31770828156.

118. Eikenberry, *supra* note 114, at 54; *see also* Kuehn, *supra* note 112, at 15 ("Educating consumers on the facts of the matter is not deemed important enough, likely because the facts would signify how irrelevant consumption is to the real problem at hand. Rather, it is easier to market goods by branding Africa and appealing to individuals with the celebrity endorser. Why admit that eliminating AIDS takes much more than a t-shirt when your compassion can be signified through the right commodity sign?").

119. *See* Jungar & Salo, *supra* note 111, at 99.

120. Eikenberry, *supra* note 114, at 54 (explaining that people "need not take any extra steps (beyond say, choosing a different brand) or make any additional sacrifices. Instead, they need only to pursue their shopping needs and wants.").

121. Worth, *supra* note 115 (quoting Tamsin Smith as stating, "One of Bono's phrases is that Red could potentially be a 'gateway drug' to the 'One' campaign. It's a very simple solution for people who maybe don't have time to write to their political representative, and will think 'wow, that's fun, I can go and buy that thing and you know what, the company's gonna give 50 per cent of their profits to the Global Fund, that's a really cool thing to do.' I don't think Red needs to become political, but it certainly can complement the political work that is ongoing.").

> and critically necessary. However, too few regular people out there really felt connected to what their taxes or donations were supporting. (RED) opens the window and lets them in to see and feel and directly participate in the incredible challenge of eradiating a treatable, preventable disease.[122]

In a separate interview, when asked "In what sense is buying a Red product revolutionary?" Smith replied:

> "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 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."[123]

There are, however, serious questions concerning how effective Red is at bringing first world shoppers closer to women and children in Africa suffering from AIDS. Some argue that Red doesn't actually bridge the gap between ethical shoppers and the beneficiaries of aid, but rather repackages that distance into something more palatable and consumable.[124] In theory, narrowing the space between consumers (or in some cases, donors) and assistance beneficiaries has both intellectual and emotional appeal because it has the potential to increase both awareness about world problems and cross-border financial assistance. In practice, and particularly where con-

122. HBS, *supra* note 2, at 8; (Blog) Red, Tamsin's remarks at the Global Fund's Donor Pledging Conference, Sept. 27, 2007, http://blog.joinred.com/2007/09/tamsins-remarks-at-global-funds-donor.html.

123. Worth, *supra* note 115. Note that the Red campaign partners, such as Starbucks, refer to "Creative Capitalism" as part of their inspiration for joining. Cause Marketing Forum Teleconference, *supra* note 18. For a positive overview of Red, see Bill Gates, *Making Capitalism More Creative*, TIME, Jul. 31, 2008, *available at* http://www.time.com/time/business/article/0,8599,1828069,00.html.

124. Eikenberry, *supra* note 114, at 54; *see also*, Jungar & Salo, *supra* note 111, for a helpful comparison of Red with a grassroots campaign South Africa called TAC (Treatment Action Campaign) which was nominated for a Nobel Peace Prize in 2004 and focuses on de-stigmatizing AIDS.

sumption is the chosen bridging device, narrowing the gap can have worrisome ramifications, as outlined below.[125]

Some commentators express the concern that advertising private solutions to public problems might result in a divestment of responsibility from and by States.[126] One way this risk could materialize is through a shifting of responsibility by consumers away from the State in favor of the private sector.[127] If citizens come to believe that private action can remedy global health problems, and that corporations are a good "weapon" for ridding the world of those problems, they may reduce their demands on government for action.[128] As O'Manique and La-

125. *See, e.g.*, Anand Ghiridaradas, *Boycotts Minus the Pain*, N.Y. TIMES, Oct. 10, 2009, *available at* http://www.nytimes.com/2009/10/11/weekinreview/11giridharadas.html (outlining some of the criticisms of ethical consumerism, including market distortion and encouragement of state irresponsibility); Laura Starita, *The Global Fund Not Seeing Red*, PHILANTHROPY ACTION, Apr. 29, 2008, http://philanthropyaction.com/nc/the_global_fund_not_seeing_red/ (describing recent Red criticism); Robert Koulish, *Turning to corporate America to save the world*, THE BALTIMORE SUN, Jul. 22, 2007, *available at* http://articles.baltimoresun.com/2007-07-22/news/0707220177_1_bono-advertising-commercial-speech ("Politics and social causes are the stuff of society's public sphere, but the public sphere is being overwhelmed by the corporate logic of cause-related marketing.").

126. Richey & Ponte, *supra* note 61, at 21; *see also* Ghiridaradas, *supra* note 125 ("[P]rivatizing compassion may tempt the state to neglect problems; then, when a recession slows shopping, AIDS orphans languish waiting for you to buy sunglasses."). Similarly, "politicians (in the name of consumers) may feel justified to cut aid budgets to finance yet more tax breaks for the rich, since Product RED takes care of aid. Thus, indirectly, Product RED may be used to de-legitimize taxation and redistribution through the public purse." *Id.*

127. Richey & Ponte, *supra* note 61, at 22; *see also* Stole, *supra* note 64, at 22 ("Rather than giving up on tax breaks and other concessions in order to reinstate government programs, businesses are teaming up with private nonprofit organizations that are seeking to repair a broken safety net."). Similarly, "[b]ecause consumers 'vote' for the causes they want to support in the mall or at the supermarket and not indirectly through an elected politician, cause marketing and the nonprofits they support may come across as being more democratic than those provided by an elected government." *Id.* at 23.

128. Richard Kim, *Corporate Consumerism Is Masquerading As Activism*, THE NATION, Oct. 17, 2006, *available at* http://www.cbsnews.com/stories/2006/10/17/opinion/main2098633.shtml ("in this [corporate consumerism] universe, there are no states, no rights to health care. . . . In the place of anything resembling citizenship we have consumer choices, 'innovation' and, above all, brand marketing, which is even now in Product Red being cast as some kind of corporate largesse.").

bonte caution, "Be wary of the twenty-first century's new *noblesse oblige* that replaces the efficiency of tax-funded programmes and transfers in improving health equity with a consumption-driven 'charitainment' model whose appearances can be as deceptive as they are appealing."[129] A counter-position holds that public and private funding sources are not substitutes but rather complements for one another.[130]

This last point echoes the concerns raised in a recent piece by Anand Giridharadas in the New York Times entitled "Boycotts Minus the Pain," in which he observes that political consumption, which traditionally takes the form of boycotting, has evolved to include a new layer of political expression through "buycotting."[131] Boycotting entails sacrifice as consumers forgo purchasing items that conflict with their values; sends only negative messages to offending businesses. In contrast, "buycotting" involves no comparable sacrifice and sends both positive and negative signals to businesses. Buycotting thereby extends the realm of political consumption from activists to mainstream shoppers, which raises the question, "Is consumption an exciting new form of citizenship? Or is it a sign of how corroded citizenship has become that shopping is the closest many of us are willing to come to worrying about labor laws, trade agreements, agricultural policy—about good old-fashioned politics?"[132] Ghiridharadas is not alone in this questioning: Others worry that efforts such as Red "are changing the face of grass-roots politics, perhaps even forcing society to

129. O'Manique & Labonte, *supra* note 77, at 1563.

130. *See* Youde, *supra* note 88, at 211 ("The problem is not that governments provide aid; it is that relying solely on state sources up to this point has not provided sufficient aid. Adding private sources can augment that deficit and encourage the formation of public-private partnerships, but it does not follow that this negates *any* role for government."). Youde further points out that overseas development assistance for health has increased over the past decade, not decreased, though he does not infer a causal relationship between increased private participation and increased public funding. *Id.* at 212.

131. Ghiridaradas, *supra* note 125; *see also* Youde, *supra* note 88, at 203 (suggesting that consumers are "informed, active and willing to 'vote with their dollars' to make a difference" and that "[t]his vote can either be negative, as with a boycott, where consumers refuse to purchase products made in a certain place or under particular conditions, or positive, as with a buycott, where consumers specifically patronize particular stores or products as a sign of support for a given cause.").

132. Ghiridaradas, *supra* note 125.

reconsider what it means to be politically involved."[133] By creating a community of givers connected primarily by purchasing decisions, "market citizenship"[134] may give the appearance of building up political citizenship, while in fact diluting its central features.[135]

A counter view is that the growth of the commercial philanthropy market reveals a desire on behalf of consumers to align their political and social values with their purchasing habits. CRM affords consumer-citizens an opportunity to reach a new and deeper balance in their behavior.[136] A related point is that rather than creating a diversion away from citizenship, CRM creates an accessible avenue for its expression because "citizens may not have the time, energy, or skills necessary to engage in such lobbying and more overt political actions. However, nearly everyone goes shopping."[137] As Jeremy Youde argues, there may be a danger in privileging one kind of political action (voting, protesting, lobbying, etc.) over another (ethical consumption) because this blinds critics to the possibility of having different means for effecting change and to the proposition that "political consumerism may be a person's *starting* point for action rather than its endpoint."[138]

Youde also takes the position that "ethical consumerism allows people to send a message to those with political and economic power about their choices and priorities" and "represents another means through which citizens can express their beliefs and interests."[139] In other words, CRM does not replace or stymie conventional modes for political participa-

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133. Koulish, *supra* note 125.

134. Ghiridaradas, *supra* note 125.

135. Koulish, *supra* note 125.

136. Youde, *supra* note 88, at 203-04 ("Political consumerism focuses on a sense of social and political global responsibility exercised by consumers who recognize that the material goods they purchase are more than mere objects; instead consumer choices are informed by a person's political values and ethics . . . . Political consumerism can send a message to policy-makers by demonstrating that people believe in a particular issue so much that they are willing to put their dollars behind it. It can also build bridges across different groups of people and bond likeminded individuals together, just as more traditional social movements do.").

137. *Id.* at 215.

138. *Id.*

139. *Id.* at 216.

tion but rather "adds one more avenue" for its expression.[140] Further, as consumers display more interest in cause-related products, and as these products multiply around them, it may be that companies will begin to compete not just in terms of campaign outputs (donation amounts) but also in terms of less tangible outcomes (social and environmental commitments) that benefit society.[141] The issue becomes whether the right incentives are in place to stimulate such competition, and if not, how to better integrate those incentives into the systems that drive commercial philanthropy.

The concerns raised above point to a more general critique of a fundraising model that prioritizes commercial interests over advancing the cause at issue. As suggested above, this critique is not limited to Red but rather extends to the CRM industry as a whole. The CRM trend has been on the rise since 1983, beginning in earnest with an Amex campaign to renovate the Statute of Liberty and Ellis Island.[142] Indeed, just since 2002, CRM-generated donations have increased from $816 million to an anticipated $1.61 billion in 2010.[143] Red also fits into a trend of increasingly internationalized CRM

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140. *Id.* Youde also draws on research that suggests that "political consumerism does not crowd out other forms of political participation" and that it is practiced by those who believe "they can have an influence on the international political and economic arena; they just believe that governments may not always be the best routes for expressing that influence." *Id.* at 217 (citing Deitlind Stolle, Mark Hooge, & Michele Micheletti, *Politics in the Supermarket: Political Consumerism as a Form of Political Participation*, 26 INT'L POL. SCI. REV. 245, 248 (2005)).

141. CONE 2008, *supra* note 87, at 22.

142. Berglind & Nakata, *supra* note 31, at 445. For each transaction using the card, one cent was donated to the cause; for each new card issued, one dollar was donated. American Express spent $6 million promoting the campaign and raised over $1 million for the renovation of the Statue; meanwhile Amex card usage grew by 28 percent and new card applications increased by 17 percent. This example aligns well with the Red experience in that more was spent on marketing than was ultimately donated, even though the end contribution was large, that disparity nevertheless raises serious questions about this particular approach to fundraising. *Id.*

143. Cause Marketing Forum, The Growth of Cause Marketing, http://www.causemarketingforum.com/page.asp?ID=188 (last visited Mar. 10, 2010); *see also* CONE 2008, *supra* note 87, at 11 (indicating that 79 percent of Americans would be likely to switch from one brand to another of about the same price and quality if the other brand is associated with a good cause, compared to 66 percent in 1993; 85 percent say that it is acceptable for companies to involve a cause in their marketing, compared to 66 percent in

campaigns.[144] The main concern with CRM is a fear that merging commercial and philanthropic interests will damage the cause being served, and philanthropy generally, because conflicting values are at play: "The goal of the for-profit organization is to build value for shareholders, which is perceived by some to be in direct conflict with the objective of the non-profit, namely to improve social conditions, educate, enlighten, and heal."[145] Where the outcome of these campaigns is to generate larger financial benefits for the corporation than for the cause, suspicions arise that CRM projects are about exploitation, rather than advocacy.[146]

Some critics also worry that transaction-focused CRM initiatives pose a threat to traditional philanthropy. As Angela Eikenberry explains, harkening back to the criticism that initiatives like Red do not live up to their promise of bridging the divide between the consumer/donor and the aid beneficiary: "The morality of philanthropy comes from acting for other people . . . . Acting for other people, in turn, requires figuring out what they really need. Yet consumption philanthropy sidesteps both this requirement and, more generally, contact with people in need."[147] Similarly, Berglind and Nakata worry that CRM might "diminish the compunction of individuals to act magnanimously toward others without expectation of return" and that "CRM may work counter to self-sacrificing sentiments by substituting consumption for morality."[148] Relatedly, some commentators highlight the risk that consumers will think that by increasing the revenues of contribution-making companies, they have done their part: "the consumer/citizen may feel entitled not to contribute to 'old style' charity, since they are 'consuming compassionately' anyway."[149]

Additionally, individualized consumer approaches to philanthropy may actually shift donations away from non-transactional forms of giving: A 1999 study showed that "cause-marketing campaigns hinder future donations to charities because

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1993; 85 percent say they have a more positive image of a product or company when it supports a cause they care about).

144. CONE 2008, *supra* note 87, at 7.

145. Berglind & Nakata, *supra* note 31, at 449.

146. *Id.*

147. Eikenberry, *supra* note 114, at 54.

148. Berglind & Nakata, *supra* note 31, at 452.

149. Richey & Ponte, *supra* note 61, at 22.

consumers think that their purchases are donations. So when the plate passes for charitable contributions, respondents to cause-marketing campaigns feel that they've already given."[150] Likewise, "consumers who support socially responsible companies believe that they have already done their philanthropic share."[151] A last related concern is that the rise of consumption-based philanthropy could numb consumers to the onslaught of marketing campaigns accompanying various causes, resulting in cause-fatigue.[152]

The increasing role of private actors in generating philanthropic capital also raises the concern that certain causes receive more attention than others based on their marketability.[153] The risk is one of cause-capture, meaning that philanthropic agendas could be co-opted by corporate interests. A corollary risk is that campaigns designed to cater to what businesses think consumers will respond to will attract more atten-

150. Eikenberry, *supra* note 114, at 53.

151. *Id.* (citing studies in Karen Flaherty & William Diamond, *The Impact of Consumers' Mental Budgeting on the Effectiveness of Cause-Related Marketing,* 10 AM. MKTG. ASS'N CONF. PROC. 151, 151-52,(1999), as well as Donald R. Lichtenstein, Minette E. Drumwright, & Bridgette M. Braig, *The Effect of Corporate Social Responsibility on Customer Donations to Corporate-Supported Nonprofits,* 68 J. MKTG. 16 (2004)).

152. "It is not difficult to imagine cause-related marketing campaigns interjecting themselves into the millions of purchase transactions that take place each day. In response, people may simply tune out and say 'no' because they cannot process each and every request, or because they believe they have already donated enough." Berglind & Nakata, *supra* note 31, at 451; *see also* Peter Panepento, *Courting Consumer Dollars,* CHRON. PHILANTHROPY, Jul. 26, 2007, http://philanthropy.com/article/Courting-Consumer-Dollars/55337/ (explaining that a potential problem with licensing is "cause clutter").

153. Berglind & Nakata, *supra* note 31, at 451 ("What happens to causes that do not elicit such deep emotional responses as does breast cancer? What is the fate of causes that are complex, ambivalent, or even elusive? For many years, there were no CRMs focused on AIDS . . "). *See also* Stole, *supra* note 63, at 23 ("Because of the market incentive, nonprofit groups and causes with the potential for creating the largest amount of good will, publicity, and consumer loyalty for the corporate partners are preferred, leaving those not selected with the choice of being unsupported or to change their approach in order to become more marketable. In effect, cause marketing can be seen as a key part of selling and legitimizing the privatization and commercialization of social service work, the work that in liberal democratic theory was at the heart of modern governance.").

tion to causes that have mass appeal.[154] This has negative consequences for causes that may be less fashionable (as AIDS used to be, for example), though no less worthy, and that may in fact be more pressing and important for advancing public welfare.[155]

As an example, Red's founders selected AIDS, Africa, and women and children (rather than AIDS globally, TB or Malaria, or equal attention to men) as the focal points for the campaign. In making this decision it is likely that Bono's clout as an advocate for Africa-related causes was an important factor, because it better leverages his celebrity in service of the cause. It is also likely that there was strong commercial interest in choosing an issue that is perceived as being tangible (buy Red, get pills), fixable (get pills, save lives), and emotionally compelling (the lives being saved are those of AIDS-afflicted women and children in Africa).[156] Arguably, this means that the public is less aware of the Global Fund's work on the other two diseases and in the rest of the world. In and of itself, this is may not be a problem. Donors often earmark funds for good reasons, including generating additional support. The issue is that as the scale of funds being earmarked and privatized increases, important items of the public agenda might be overlooked.[157] Note, too, that a decision was made not to include labor rights or the environment within the ambit of Red's social mission.[158]

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154. CONE 2008, *supra* note 87, at 18-19 (explaining that 83 percent of Americans consider the emotional appeal of a given cause to be a deciding factor in their decision-making).

155. Eikenberry, *supra* note 114, at 53 (explaining how the Pink Ribbon campaign may lead consumers to believe that breast cancer is the most pressing health problem facing women today, when in fact heart disease is the more prevalent cause of death).

156. *See, e.g.*, Red Manifesto, *in* HBS, *supra* note 2, at 12 ("If they don't get the pills, they die. We don't want them to die. We want to give them the pills. And we can. And you can. And it's easy.").

157. Stole, *supra* note 63, at 29.

158. For example, at the Red launch, Bono explicitly stated: "We do not think that trade is bad. We are for labour issues. Labour issues are very serious, but six and a half thousand Africans dying is more serious." RED product launch at Davos video, www.joinred.com, cited in Richey & Ponte, *supra* note 61, at 21.

V. Inadequate Transparency: Why What We Don't Know Matters

Many of the criticisms laid out in the previous section can be identified with a particular political or ideological leaning, dividing those who believe in the unique power of the private sector, the market, and the individual to provide innovate solutions for advancing public welfare, and those who feel that this duty belongs to and is best carried out by the state.[159] Interestingly, however, the demand for transparency falls onto more neutral political ground, and can serve to advance the interests of either side. The following sections examine the need and mechanisms for ensuring enhanced transparency and increasing accountability among CRM initiatives.

Transparency matters for consumer protection, for assessing effectiveness, and perhaps most importantly, for maintaining public trust in philanthropy. Particularly in the context of an exponentially expanding CRM industry, and in a decade scarred by "spectacular acts of malfeasance"[160] from the likes of Bernard Madoff, Merrill Lynch's John Thain, United Way, and Enron, we should be concerned that a general atmosphere of distrust looms over corporate efforts to "help." Where transparency is lacking, distrust may well blossom into outright philanthro-skepticism.[161]

A. *The Problem With Opacity*

There is a lot we do not know about how Red operates administratively and financially as a fundraising model and an awareness raising campaign. For a start, the selection process for admitting Partners into the Red partnership is completely opaque. It is therefore unclear whether Partners are chosen

159. For a helpful discussion of this division, and an explanation of the difference between market citizenship and social citizenship, see Youde, *supra* note 88, at 209-10.

160. Berglind & Nakata, *supra* note 31, at 444.

161. *See* Deborah L. Rhode & Amanda K. Packel, *Ethics and Nonprofits*, 7 Stanford Soc. Innovation Rev. 29, 30 (2009) (explaining that trust in both private corporate leadership and nonprofits has eroded); New York Office of the Attorney General, What's in a Nonprofit's Name? Public Trust, Profit and the Potential for Public Deception. A Preliminary Multi-state Report on Nonprofit Product Marketing 33 (1999), *available at* http://www.oag.state.ny.us/media_center/reports/nonprofit/full_text.html [hereinafter A.G. Report].

for entry based on (1) their ability to out-bid competitors financially (e.g., how much they commit to paying in licensing fees or in pledges to the Global Fund); (2) their social commitment to eliminating AIDS in Africa;[162] (3) their CSR profile; (4) the size of their consumer base and its potential for generating sales revenues and, as a result, contributions and awareness for the campaign; or (5) some combination thereof. The selection criteria are relevant because of the risk that consumers will perceive a Partner's affiliation with Red as an endorsement of that Partner by Red—and by extension Bono and the Global Fund—even though there is no such endorsement. Indeed, a consumer might reasonably believe that because Bono and the Global Fund are associated with Red products, safeguards have been put in place to ensure that the product was manufactured in accordance with high ethical and environmental standards.[163] Contrary to what consumers might expect, however, the Red label indicates nothing about the processes involved in the production or transfer of Red products. In fact, when asked whether Red was being used by the Partners to restore their reputations, Bono responded: "We are not endorsing their products, these products endorse us."[164] Arguably, by placing themselves at the forefront of a

162. A few of the Partners have also outsourced some of the production for their Red items to manufacturers in Africa, which demonstrates an interest in supporting African economies in ways that extend beyond the Global Fund. For example, Starbucks Red coffee beans are harvested in Rwanda, and The Gap has production facilities that make T-shirts out of organic African cotton in Lesotho and provide HIV/AIDS testing and treatment services to garment workers. See Ponte et al., *supra* note 21, at 313, for additional examples. These types of measures help to further enhance the Partners' CSR profiles, both individually and collectively.

163. "Popular perception of a brand includes the idea that a branded product is 'legible': it can be understood, from its material composition, to the whos and whats of its design and production. Yet, as with CSR activities in general, a brand can house many different kinds of products, services and initiatives and the specific information made available to the public about any of these is highly limited and selective." Stefano Ponte, Lisa Ann Richey & Mike Baab, *Bono's Product (RED) Initiative: Wedding Hard Commerce and Corporate Social Responsibility* 38 (Danish Inst. for Int'l Stud., Working Paper no. 13, 2008).

164. Richey & Ponte, *supra* note 61, at 2 (citing Tim Weber, *Bono bets on Red to battle Aids*, BBC News, Jan. 26, 2006, http://news.bbc.co.uk/2/hi/business/4650024.stm). *See also* Worth, *supra* note 115 (quoting Tamsin Smith: "We choose brands that are iconic. We have guiding principles and

new CRM (or CSR) initiative, some additional scrutiny accrues to the Partners,[165] but there is little in the Red model to ensure that the products themselves leave a small environmental, or large social, footprint.

As a result of a perceived endorsement by Bono and the Global Fund of labeled items, consumers may feel more inclined to buy a Red-branded product than an equivalent non-Red item. This issue was explicitly addressed in a report (the "Report") by sixteen Attorneys General ("AGs") that critically examined the implications of CRM and commercial co-venturing for consumer protection.[166] Specifically, the Report considers situations in which a charity's logo is licensed to a for-profit company in exchange for a fee. As with Red, once licensed, the company can use the logo to market its products. To protect consumers from confusion, the AGs strongly recommended that if a charity (or an entity such as Red) does not endorse the product on which its logo is displayed, that fact should be clearly disclosed in advertising for that product.[167]

The Report also recommends disclosing two other important features of the Red model: licensing fees and category-exclusivity. Both are viewed as material facts that may inform purchasing decisions.[168] With respect to licensing fees, there is a concern that consumers expecting a charity (or an entity acting in its stead) to lend its logo to a business on the basis of a substantive or ethical affinity might be less inclined to buy a

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we ask and encourage our partners to uphold them . . . . When a company joins Red they are essentially putting themselves on the line and will be under significant scrutiny because they are being very visible about what they stand for. We believe that is a regulating system in and of itself.").

165. *See* HBS, *supra* note 2, at 5; Worth, *supra* note 115; BENDELL ET AL., *supra* note 95, at 3, *available at* http://lifeworth.com/lifeworth2008/2009/05/inspired-marketing-or-redwash.

166. Note that though the AG REPORT, *supra* note 161, is somewhat dated, the concerns it addresses and the recommendations it makes remain highly relevant today.

167. A.G. REPORT, *supra* note 161, at 22. Of note are problematic examples involving the appearance of endorsement, such as Estee Lauder's use of the Pink Ribbon (breast cancer) logo on its cosmetics where the latter contained parabens chemicals that actually increased chances of developing cancer. A similar contradiction occurred with Yoplait and rBGH dairy products. Pink Ribbon.org, Case Studies of Case Marketing, http://www.pinkribbon.org/ThinkPink/CaseStudiesofCauseMarketing/tabid/338/portalid/0/Default.aspx (last visited May 12, 2010).

168. A.G. REPORT, *supra* note 161, at 27-30.

branded product if the fact of compensation by the business were disclosed.[169]

With respect to exclusivity arrangements, there is a concern that many consumers mistakenly assume that a product that is advertised using a charity-backed logo is superior to non-branded products in the same category.[170] Category-exclusivity exacerbates this confusion because consumers may mistakenly assume that the logo appearing on only one product within a category indicates an extra layer of product scrutiny and approval.[171] If consumers come to learn that the reason only one product within a category bears the cause-related logo is not substantive but contractual, they may feel less inclined to purchase the branded item. Further, as suggested above, it may be that Partners are admitted into Red and granted category-exclusivity not on the basis of how much they are willing to contribute to the Global Fund, or on the level of social commitments they are willing to undertake, but rather on the basis of how much they are willing to pay for the rights to use the logo. If this were the case, and if this fact were disclosed, one could imagine that consumer behavior would again be affected, particularly since higher licensing fees would not result in more money going to the Global Fund (since they are paid to the Persuaders, not the charity), and because, in making purchasing decisions, ethical consumers seek to help charity beneficiaries rather than businesses.

Another risk of insufficient transparency, highlighted earlier, is that unless the precise percentage or dollar amount of the sale price going to the Global Fund is clearly disclosed on Red items, consumers may make decisions based on mistakenly inflated assumptions of the beneficial impact of their purchases. As mentioned, the Partners adopt inconsistent practices in this regard. This risk is aggravated by the powerful slogans and advertisements that communicate the potential of buying Red to "change the world."[172]

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169. *Id.* at 28.

170. *Id.* at 30.

171. *Id.*

172. For example, Gap has advertised: "Can a jacket change the world? This one can." Kim & Ambrogio, *supra* note 79, at 17. Note too that in the case of Red, one cause of consumer confusion involves the figures relied upon to demonstrate Red's success. It is important to note that the funds raised by the campaign represent less than 1 percent of the total contribu-

Such concerns extend far beyond Red.[173] Indeed, suspicions concerning the possibility of CRM being more about exploitation than advocacy are fueled by the lack of transparency that often characterizes these initiatives.[174] A 2003 study on this issue concluded that some CRM campaigns actually rely on consumer misunderstanding about the donations.[175] In their Report, the AGs address this concern by recommending that cause-related advertisements "accurately portray, and do not misrepresent, the actual terms of the arrangement or the

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tions to the Global Fund. *See* The Global Fund, Pledges to Fight AIDS, Tuberculosis, and Malaria: Pledges, *available at* http://www.theglobalfund.org/documents/pledges_contributions.xls (last visited May 12, 2010). This figure is relevant, not because it makes Red's achievements to date unremarkable, but because the campaign is marketed in such a way that individuals may think that their purchase-contribution will make a much greater impact than it actually does. In reality, the potential for the private side of the Global Fund partnership to achieve balance-shifting contribution levels is limited at best. Global Fund representatives explained that the prospect of private sector donations reaching even 10 percent of total funding is ambitious: 'Through RED and other initiatives, the Global Fund hopes to increase the private sector share of Global Fund income from less than one percent is currently to ten percent or more in the long term." Facebook.com. Join Red Facebook Group, http://www.facebook.com/group.php?v=wall&viewas=0&gid=2211551955 (last visited May 12, 2010); *see also* Richey & Ponte, *supra* note 61, at 24 (quoting the same figure from the Global Fund's website).

173. CONE 2008, *supra* note 87, at 11. Only 58 percent of Americans believe that companies are providing enough detail about their CRM efforts, and today's consumers want to know how much is given to the cause and over what time period. *Id.*

174. Berglind & Nakata, *supra* note 31, at 9.

175. *See* Stole, *supra* note 63, at 29 ("A serious problem associated with cause marketing, according to Alan Andresen (2001), is deception. Most cause-related campaigns tend to highlight the cause and downplay the business objective. All too frequently, the true nature of the business's contribution is not explained to the public. How, for example, is "a portion of the profits" translatable into dollars and cents for the cause? Who, in other words, benefits more from a transaction, the business or the nonprofit organization?"); Berglind & Nakata, *supra* note 31, at 9 ("[C]onsumers are susceptible to profit-equals-price (PEP) and profit-overestimation effects. The PEP effect occurs when consumers are confused about whether a percentage of profit or price is given to the charity. The latter would be of greater value, but consumers are sometimes too hurried when making purchases to figure the size of their individual donation.") (citing G. Doulgas Olsen, John W. Pracejus, & Norman R. Brown, *When Profits Equals Price: Consumer Confusion About Donation Amounts in Cause-related Marketing*, 22 J. PUB. POL'Y & MKTG. 170, 170-80 (2003)).

true effect consumers' purchasing decisions will have on charitable contributions."[176] Another component of the "true effect" calculus would include knowing how much each Partner gives to the Global Fund each year. As discussed above, however, this information cannot be obtained because Red contributions to the Global Fund are disclosed only in the aggregate. Moreover, it should be noted that in New York, where the Global Fund is registered as a tax-exempt entity, charities are not required to disclose the contributions received from their commercial co-venturers.

Given that the agreements between the Persuaders, the Partners and the Global Fund are undisclosed, we do not know the answers to the following questions:

> (1) What amounts of licensing fees are paid to the Persuaders?
>
> (2) What are the precise financial commitments made to the Global Fund and, more specifically, what are the methodologies for calculating contributions? How are profits defined/calculated? Is there a cap on the Partners' annual donations (beyond which individual purchases no longer translate into contributions)?[177] Do a minimum number of items have to be sold before any donation is made?[178] And how easy are these commitments to amend?[179]

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176. A.G. REPORT, *supra* note 161, at 29.

177. CEO Susan Smith Ellis explained that to her knowledge, there is no cap on donations from Red partners though there may be a minimum level of profitability required before a donation at the agreed pledge amount is made. Where that level is not reached, Partners may not be able to donate a percentage of the revenues. However, Partners are required to make a minimum donation to the Global Fund regardless of profitability. CEO Phone Interview, *supra* note 5.

178. For instance, the organization Breast Cancer Action launched a project called "Think Before You Pink," which calls on consumers to ask certain critical questions before making a pink ribbon-labeled purchase, including: How much money from your purchase actually goes toward breast cancer? Is the amount clearly stated on the package? What is the maximum amount that will be donated? *See* Think Before You Pink, Before You Buy Pink, http://thinkbeforeyoupink.org/?page_id=13 (last visited May 12, 2010) [hereinafter Think Before You Pink].

179. For example, Apple used to indicate that $10 from the sale of each Red iPod Nano would go to the Global Fund. Now, it states only that a portion of the sale price will be donated. Apple, iPod – (PRODUCT) RED, http://www.apple.com/ipod/red/. Does this indicate that their commit-

(3) What social commitments or investments—related to AIDS in Africa—do the Partners undertake, if any?[180] Relatedly, what ethical guidelines are the Partners required to abide by?[181]
(4) What conditions, other than earmarking funds for AIDS in Africa and disclosing Red contributions in the aggregate, govern the relationships between the Global Fund, the Persuaders, and the Partners?
(5) What are the procedures for a Partner wishing to leave the Red partnership (as Motorola and Microsoft's Vista program have done), and what are the outcomes of such departures in terms of the effect on contributions to the Global Fund?

Having access to the agreements would reveal a great deal about how Red works and how efficient the Red model is in terms of the costs and the benefits it generates for both the Global Fund and for the Partners. It would also enlighten consumers as to the actual beneficial impact of their purchases.[182]

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ment to the Fund has changed? If so, how, and what are the consequences, if any, for its rights to use the Red label and for the Global Fund?

180. Another question to ask of CRM partners is: What is the company doing to ensure that its products are not contributing to the very forces perpetuating the harms that the campaign seeks to remedy? This relates to the concern that CRM business partners, or co-ventures can (inadvertently or not) profitably present themselves as cause-allies through their financial contributions to charity even though their actual products or production processes may be harming the cause. For example, dairy products containing animal hormones that risk leading to breast cancer should not be pink. *See* Think Before You Pink, *supra* note 178 (urging consumers to beware associating a label with an endorsement of the product).

181. Susan Smith Ellis clarified that, "(RED) requires that all Proud Partners enter into a legally binding agreement that requires them to maintain professional standards of business conduct in their manufacturing and sourcing. Further, this agreement specifically requires these partners to work towards providing HIV/AIDS counseling and treatment to any person working for that company or making a (RED) product." Email from Susan Smith Ellis, CEO, Red (Feb. 18, 2010, 12:59pm) (on file with author). As previously noted, these standards are not available to the public. CEO Phone Interview, *supra* note 5.

182. It should be noted that in 2010 the Global Fund, which is a registered charity in the state of New York, filed a form CHAR500, a type of publicly accessible annual statement, for 2008 (it is behind for 2009). As discussed at greater length below, this filing sets out the co-venturers' names and addresses, and what their respective financial commitments amount to in general terms. The form does not require specification of how "profits" are cal-

B. *Business Interests*

While increased transparency would facilitate an accurate assessment of Red's effectiveness as a financing model, a counter view is that the lack of transparency is *necessary* for effectiveness. Accordingly, Bobby Shriver declined to specify how much The Gap contributed to the Global Fund and stated in an interview with the Chicago Tribune that the information was not and would not be made publicly available because that degree of disclosure would "scare away corporate partners and kill (RED)."[183] Similarly, an email from the Global Fund's legal department explained that disclosing donation figures only in the aggregate was, in the first instance, "a business decision: the different nature of the campaigns with each partner may lead to comparisons that would not be in the best interest of the (RED) campaign."[184]

It may be that the Partners are reluctant to disclose their individual contributions because the price of their goods differs substantially (compare a laptop and a t-shirt, for example), which in turn may impact the dollar amounts raised for charity through sales. In other words, with disclosure some Partners would compare unfavorably to others, not because of their level of commitment to the cause, but because the amounts generated per sale of labeled items are smaller, and overall donations are as well. If this is in fact the basis for justifying non-disclosure of Partner donations, this author would question the assumption that conscientious consumers are unable to compare percentages (meaning the share of the sale price going to charity) alongside per-Partner contributions without being overly influenced by the latter. Further, the fact that there are comparison issues in the first place seems to be a direct outcome of the category-exclusivity provisions, which,

culated, however, nor does it specify whether a minimum number of sales have to be made before donations are made to the Fund, if there is a cap on donations, or whether the commitments can be altered. To illustrate why this lack of information is problematic, consider: if Apple decides to lower its pledge from $10 per Nano to $5, would any notice need to be given to consumers? As another example, if a co-venturer leaves the Red Partnership, as Motorola has done (which is not reflected in the 2008 filing), what are the financial consequences for the Red phones still in circulation? Additionally, the form does not specify the amounts actually received by the charity.

183. Schoenberg, *supra* note 109.

184. Oct. Global Fund Partnerships Officer Email, *supra* note 54.

as discussed earlier, generally benefit the Partners. As a result, it seems disingenuous to argue that cross-goods comparisons would be unfair to the Partners.

Along similar lines, it is possible that increased disclosure would unfairly damage Red's popularity because consumers neither know nor care to understand the many costs associated with running a business.[185] Thus, while a donation of 5 cents on every cup of coffee purchased using a Starbucks Red card may not sound like a lot, even pitiful to outside observers,[186] it might actually represent a large cumulative sum in absolute terms, as a share of profits, or both. While it may be true that consumers lack the knowledge to contextualize these figures, is this unavoidable? Given the sophistication of information management technologies available today, is there no way to make this information accessible in a manner that would avoid consumer protection issues, satisfy curious minds, and shield the co-venture from unfair criticism?[187] A last worry for the Partners is that the donation figures do not capture other as-

185. *See* Greenblatt, *supra* note 89 (stating of his venture, Ethos Water, that "[i]ts marketing clearly states that the brand will donate $.05 per bottle sold, so every bottle makes a difference. Many have commented that this appears a paltry sum, but such top-line analyses often fail to consider the complicated cost structures and layered margins across the value chain, particularly when products move from manufacturer to distributor to broker to retailer.").

186. Starbucks was recently subject to ridicule on William Easterly's Aid Watch blog in a piece that led off by saying, "I was curious about what the going rate is these days for attracting customers who want to save Africa. Five cents was a little lower than I expected." William Easterly, *Can Starbucks Buy a 'Saving Africa' Image for a Nickel?*, Aid Watch, Apr. 23, 2009, http://aidwatchers.com/2009/04/can-starbucks-buy-a-"saving-africa"-image-for-a-nickel/. The senior vice president of public affairs at Starbucks responded: "It is important to consider the collective power of these contributions since each partner brings something different to the table. Larger brands, with lower price point items, will garner more volume while smaller brands may help spread the message to niche audiences and new consumers, all the while raising money and expanding the base of people who are aware of the crisis of AIDS in Africa and willing to do something about it." *Response to 'Can Starbucks Buy a "Saving Africa" Image for a Nickel?'*, Aid Watch, Apr. 28, 2009, http://aidwatchers.com/2009/04/response-to-can-starbucks-buy-a-saving-africa-image-for-a-nickel/.

187. "I see a lot of danger," said Ben Davis of Buy(Less)Crap. "[T]his is a new frontier. A Wild West attitude. A lawlessness. We need to provide some genuine structure." Peter Panapento, *Courting Consumer Dollars*, CHRON. PHILANTHROPY, Jul. 26, 2007, at 21-22.

pects of their contributions, such as awareness-raising.[188] This is a fair concern. However, other figures, such as those related to awareness of the Red campaign could serve to fill that gap.[189]

While there may be good reasons for limiting disclosure by Red and the Partners, and while it is not surprising that businesses would want to keep information confidential, and may even condition their participation on such confidentiality, it is important to consider what is at stake in accepting opacity as a necessary condition for private sector participation. Indeed, some question whether relying on a "whatever works"[190] principle for raising money for charity is reasonable. For instance, in their Report, the AGs explained that they were not swayed by the argument that category-exclusivity is a condition for charities to access the financial rewards afforded by the licensing agreement, imposed on the grounds that businesses do not want to pay for something that competitors could easily obtain. They concluded:

> [T]he Attorneys General find unpersuasive an argument that a practice with the potential to mislead or confuse the public is required as a business necessity. If accepted, such logic would permit quite a broad range of conduct, including unlawful conduct, provided that it satisfied the financial interests of those

188. Stole, *supra* note 63, at 29. Note that marketing costs are made up of cause-related expenses (intended to increase awareness of AIDS in Africa and the Global Fund), on the one hand, and conventional product advertising expenses (intended to increase profits), on the other, which makes obtaining the marketing cost figures less useful than might be expected. Indeed, how would one break down what percentage of the overall marketing budget goes toward the cause (which consumers may wish to hold companies accountable for) and what percentage goes toward increasing sales (which consumers may not care to hold companies accountable for)? In this regard, the ADVERTISING AGE piece, *supra* note 36 (describing the total Red donations to the Global Fund as significantly less than the costs of advertising the campaign), and the controversy it generated, may have been unnecessarily alarmist.

189. *See* HBS, *supra* note 2, at 8. Between 2006 and 2007, Red brand awareness had increased by 16 percent generally, and by 30 percent for the campaign's "core demographic" *Id.*

190. Jungar & Salo, *supra* note 111, at 93.

> engaged in the conduct. Clearly, this is an unacceptable rationale for perpetuating exclusivity.[191]

Such reasoning is equally applicable to non-disclosure conditionalities.

VI. Using Charities' Regulation to Enhance Transparency

There are reasons to push for transparency even if it means risking losing corporate support. Enhanced transparency would alleviate much of the consumer confusion that permeates CRM and that can be exploited to enhance financial gains for the commercial co-venturers. If consumers are given the means to develop well-grounded expectations about what buying Red (or pink or green for that matter) can realistically achieve as far as raising funds and support for the cause, then some of the concerns about the individualization and depoliticization of assistance could also be mitigated. Lack of transparency heightens the risk that nonprofits involved in CRM will see their legitimacy and credibility compromised:

> There is little room to question that public trust is the true currency supporting nonprofit organizations. Each and every nonprofit that the Attorneys' General staff have met with have identified their names and reputations as being their central and greatest asset. . . . Safeguarding the confidence and trust placed in nonprofit organizations necessarily serves as a bedrock objective.[192]

Though some expansion and re-interpretation is needed, regulatory frameworks are already in place to tap the potential of transparency for ensuring greater levels of consumer protection, improving accountability, and maintaining public trust in philanthropy. This section provides recommendations for updating the regulatory system in order to bring programs like Red that cross the line from pure commerce into philanthropy more visibly onto the regulators' radar. These recommendations would serve two important purposes. First, they

191. A.G. Report, *supra* note 161, at 32. For an example of an alternative model of raising money for charity that does not require exclusivity, see the I Do Foundation, *supra* note 33.

192. A.G. Report, *supra* note 161, at 33.

would give regulators access to the information needed to ensure that solicitation statutes and consumer protection laws are complied with. Second, they would give the public—likely through the filters of charity watchdog groups, the media, and academia—more information on which to base purchasing and related socio-political decisions.

While federal tax legislation regulates charitable activities generally, many of the specific rules for regulating charities and protecting the public are developed and implemented at the state level.[193] Much of the oversight function falls to local government agencies, usually the state AGs.[194] State rules are generally quite similar, partly because in drafting or updating their charitable solicitation statutes, thirty-eight states have relied on the Model Act Concerning the Solicitation of Funds for Charitable Purposes, which was produced in 1986 by state AGs from across the country.[195] It is worth noting that nine states, including Delaware, where the Persuaders is incorporated, have no such solicitation statutes.[196] Additionally, state AGs collaborate in developing policy and regulatory responses to changes in the charities landscape. The Report referred to above is a useful example of such collaboration.

This section focuses on New York's solicitation statute, which sets out the rules for regulating the solicitation of funds for charitable purposes and serves to protect state residents and legitimate charitable organizations.[197] New York is the focus because it is the only state where the Global Fund is currently registered as a charity, and because New York's rules are quite similar to those of most states. Additionally, because New York is among the most active states in terms of the number of registered charities and annual tax deductions filed for charitable donations, it is helpful to consider how its rules could be updated to maximize disclosure by actors such as those involved in Red.

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193. Jamie Usry, Univ. of Utah Ctr. For Pub. Policy & Admin., Charitable Solicitation with the Nonprofit Sector: Paving the Regulatory Landscape for Future Success, 5-7 (2008), *available at* http://www.cppa.utah.edu/publications/nonprofit/Charitable_Solicitation.pdf.

194. *Id.*

195. *Id.*

196. *Id.*

197. Solicitation and Collection of Funds For Charitable Purposes, N.Y. Exec. Law §§ 171-77 (Consol. 2010).

The recommendations made in this section are that (1) New York should require more disclosure of commercial co-venturers; (2) that the Persuaders, as an example of a new type of intermediary between charities and donors (and, by extension, consumers), should be regulated as a Professional Fundraiser under the New York Executive Law; and (3) in the alternative, that the Persuaders should be regulated as a commercial co-venturer. If the regulatory framework were expanded as suggested here, many of the transparency issues raised in the previous sections would be alleviated and other programs that emulate Red's fund raising model would generate less concern going forward.

A. *Regulating the Partners or Co-Venturers*

Several states do impose some amount of regulation on commercial co-ventures.[198] In New York, charities that engage in such arrangements, like the Global Fund, must enter into a

198. Charities in Alabama, Colorado, Connecticut, Florida, Hawaii, Louisiana, Massachusetts, Maine, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, South Carolina, and Utah must register the names of commercial co-venturers. Some of these states have additional filing requirements for the commercial co-venturers themselves: Alabama (must file a copy of the co-venture contract); Colorado (additional disclosure requirements if more than one-half of the campaign's proceeds will be derived from transactions in the state); Connecticut (advertisements must disclose portion of sale price going to charity); Florida (in some circumstances must disclose amount of sale price going to charity; provide AG with a final accounting); Hawaii (must have a final copy of accounting available for inspection if requested by the AG); Louisiana (must provide a final accounting to the AG); Massachusetts (must file a copy of the co-venture contract, disclose the amount or percentage of proceeds to be donated to charity and provide accounting report); Maine (must file fundraising activity report); New Hampshire (advertisements must disclose portion of sale price going to charity); New Jersey (must file a copy of the co-venture contract, disclose the expected amount or percentage of proceeds to be donated to charity, and afterward the gross amount of income attributable to charity); New York (must file a statement of the terms of the co-venture contract and a statement indicating whether the co-venture has provided the charity with an accounting); Ohio (must provide a final accounting); Oregon (must have a final copy of accounting available for inspection if requested by the AG); South Carolina (must file a copy of the co-venture contract and an itemized revenue statement of co-venturer's contributions); and Utah (any advertisements must disclose the amount or percent of proceeds attributable to charity). *See generally* State Charity Provisions Spreadsheet, http://www.law.nyu.edu/journals/jilp/issues/jilpvolume42/index.htm.

contract with the co-venturer. Charities must also file an annual report (the form CHAR500) with the Charities Bureau, which includes (1) the name and address of each co-venturer; (2) a statement of the financial terms and any conditions of each co-venture contract[199]; and (3) a statement whether each commercial co-venturer has provided the charity with an accounting of its activities during the year. While a good start, these requirements would benefit from being both more comprehensive and better detailed. Given that it serves the purpose of an annual report, the CHAR500 form should include disclosure of how much was actually contributed to the charity by its co-venturers, which would help measure the success of the program for each commercial partner. This requirement should be added as a line item to the form, as is done in Florida, Louisiana, Massachusetts, Maine, New Jersey, Ohio, and South Carolina.

The form should also require disclosure of the methodologies used to calculate the co-venturers' contributions in order to ensure that they are in line with the representations made to, and the expectations of, consumers.[200] This could be achieved by providing better instruction for filling out the form.[201] Similarly, either the instructions or the form proper should clarify what is meant by "any conditions of [the] contract." Presumably this refers to any stipulation in the co-venture agreement that pertains to caps on contributions or to minimum sales levels that have to be reached before contributions are made. If that were the case, a number of the transparency issues discussed earlier would be alleviated by full compliance with the form. However, the wording is not clear, a failing that should be remedied, particularly given that this information would be valuable to consumers. It would also be valuable to charities that are interested in evaluating their own

199. Note that this is the language from N.Y. EXEC. LAW § 173-a-4(b), which is far more specific than the language on the form. See item 5: "Compensation arrangement with [commercial co-venturer] (provide description)."

200. For example, what does it mean for The Gap to say that it donates up to 50 percent of the profits from the sale of a Red t-shirt?

201. *See* New York State Office of the Attorney General, Charities Bureau Forms and Instructions, *available at* http://www.charitiesnys.com/charindex_new.html (last visited May 12, 2010) (providing access to Annual Filing instructions for CHAR500)

CRM or co-venture arrangements in order to negotiate favorable terms with business partners.

Additionally, New York charities should be required to file and make public the contracts they enter into with commercial co-venturers, as is done in Alabama, Massachusetts, New Jersey, and South Carolina. Ideally, the contracts contain the following information:

> (1) A statement of any guaranteed minimum and/or maximum percentage of gross receipts to be remitted to the charity, including licensing fees and royalties;
> (2) Where applicable, a statement of non-monetary contribution commitments such as social undertakings related to the cause at issue or awareness-raising efforts;
> (3) A description of the methodology for calculating co-venturer contribution;
> (4) A description of the methodology and anticipated timeline for distribution of contributions;
> (5) The conditions of the charity's permission to use its name and other intellectual property, including specification as to whether or not there is any endorsement by the charity of the co-venturer's products;
> (6) The co-venturer's acknowledgement of its obligation to disclose the dollar amount or percentage of the sale price that will benefit the charity in its advertising;
> (7) A statement of any category-exclusivity rights; and
> (8) A description of the terms under which either party may amend or terminate the agreement, and the methodology for distributing revenues in the event of termination.[202]

Charities should also be required to file and make public the accounting statements provided by their co-venturers as specified by Article 7 of the Executive Law. Indeed, under New York law, a co-venturer must provide its charity partner

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202. This list was drawn in part from a piece by Christie Grymes, *Legal tips on cause marketing promotions for mobile and other media*, Mobile Marketer, Feb. 10, 2009, *available at* http://mobilemarketer.com/cms/opinion/columns/2608.print.

with a detailed account of the number and value of items sold and the precise amounts contributed to the charity, either periodically or at the termination of a sales promotion.[203] As the rules stand, however, charities need only indicate whether or not such an accounting statement has been received and no filing is required.[204] Making these statements public would do a great deal to enhance transparency and facilitate accurate performance assessments of commercial co-venture arrangements.

Given that very little would be revealed about co-venturers' profits or internal decision-making, these disclosures should not trouble the businesses involved. Such disclosures would, however, provide useful information to the public about initiatives that blend commerce and philanthropy and that call on them to re-target purchasing decisions. Separately, as suggested above, knowing more about the terms of existing co-venture arrangements would be helpful to charities seeking to secure stronger negotiating positions in their own transactions with businesses. The ability to compare these terms would provide important references for charities and help them to obtain more meaningful commitments, monetary or otherwise, from co-venturers and, therefore, to better serve their causes.[205] Indeed, some commentators note with

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203. N.Y. EXECUTIVE LAW, 173-a-3: "Within ninety days after the termination of a sales promotion advertised to benefit a charitable organization, a commercial co-venturer shall provide such organization with an accounting stating the number of items sold, the dollar amount of each sale, and the amount paid or to be paid to the charitable organization. In the event that such sales promotion is longer than a one year period, the commercial co-venturer shall provide the charitable organization with an interim report, at least annually."

204. Other states, including Colorado, Florida, Hawaii, Louisiana, Massachusetts, Maine, Ohio, Oregon, and South Carolina, require access to accounting statements. *See generally* State Charity Provisions Spreadsheet, http://www.law.nyu.edu/journals/jilp/issues/jilpvolume42/index.htm.

205. *See* Stole, *supra* note 63, at 34 ("Funding to the nonprofit sector is increasingly pegged to our behavior as consumers and this is problematic. One of the latest trends in the world of cause marketing include workshops that train nonprofits on how to market themselves and their causes to potential businesses. . . . Thus, it is no longer business looking to do good, but nonprofits desperate for funding trying to appear good in the eyes of business.") (citations omitted). This trend should be reversed, with charities taking the lead in setting the terms of the arrangements rather than the businesses.

alarm that philanthropy has become synonymous with public relations[206] and that charitable fundraising is becoming increasingly indistinguishable from marketing.[207] This echoes the concern that with the rise of CRM, charitable interests risk becoming subservient to corporate interests.[208] It seems important therefore to consider mechanisms, such as information sharing, for equipping charities with the skills and knowledge necessary to protect their interests, and those of their beneficiaries, and for negotiating suitably high levels of financial and social commitments in their co-venture arrangements.[209]

Several of the disclosures recommended here speak to the AGs' concerns regarding endorsement, exclusivity, licensing fees, and consumer expectations of charitable impact, as discussed above.[210] These concerns are often reflected in the "Prohibited Acts" section of state solicitation statutes as a set of affirmative obligations of charitable actors, such as co-venturers, fundraisers, and charities, not to mislead consumers. However, these obligations are often insufficiently detailed, and though their inclusion in statutes alongside requirements for

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206. *See generally id.*

207. JAMES BAUSCH, PUBLIC ENTITY RISK INSTITUTE, MONEY AND REPUTATION: BENEFITS AND RISKS IN CAUSE-RELATED MARKETING 6 (2000), *available at* https://www.riskinstitute.org/peri/index2.php?option=com_bookmarks&do_pdf=1&id=871. Bausch adds, "When not-for-profit organization allows the quest for funds to dominate its thinking, the "marketers" end up calling the shots, with the program agenda following that lead. And when that happens, the very nature of the organization—and of philanthropy—are placed in peril." *Id.*

208. Charities seeking to benefit financially from affiliations with businesses must be careful in negotiating their CRM relationships in order to maintain the value of their most important asset, namely, their reputation. *See* BAUSCH, *supra* note 207; *Cause-Related Marketing Campaigns May Contain Pitfalls for the Unwary*, NONPROFIT NAVIGATOR, June 2005 newsletter, *available at* http://www.harmoncurran.com/navigator/june2005.html.

209. *See* BAUSCH, *supra* note 207, at 5, (providing a list of recommendations to charities, initially published by Nonprofit World in 1999, which includes items such as: do not come cheap, control all uses of your name, tell the public the whole truth, and establish an organization policy for CRM that includes screening the business and having all proposals reviewed by the board of directors).

210. Note that the Better Business Bureau's Standards for Charity Accountability also reflect the AGs' recommendations. *See* U.S. Better Business Bureau, Standards for Charity Accountability, http://www.bbb.org/us/charity-standards/, No. 19.

basic disclosures through charities' annual reports is important, additional disclosure in product advertising would also be a valuable mechanism for safeguarding consumer protection.[211]

B. *Regulating the Persuaders and Other New Types of Professional Fundraisers*

Several kinds of entities are required to register and file regular reports with the New York Attorney General's Charities Bureau. Turning first to the Persuaders, there are two relevant categories under which it could be regulated: Professional Fundraiser ("PFR") or commercial co-venturer.

A PFR is defined as follows:

> Any person who directly or indirectly by contract, including but not limited to sub-contract, letter or other agreement or other engagement on any basis, for compensation or other consideration (a) plans, manages, conducts, carries on, or assists in connection with a charitable solicitation[212] or who employs or otherwise engages on any basis another person to solicit from persons in this state for or on behalf of any charitable organization. . .or who engages in the business of, or holds himself out to persons in this state as independently engaged in the business of soliciting for such purpose; (b) solicits on behalf of a charitable organization or any other person; or (c) who advertises that the purchase or use of goods, services, entertainment or any other thing of value will benefit a charitable organization but is not a commercial co-venturer.[213]

211. Such disclosure is required to different extents in Connecticut, Florida, Massachusetts, New Hampshire, New Jersey and Utah. *See generally* State Charity Provisions Spreadsheet, http://www.law.nyu.edu/journals/jilp/issues/jilpvolume42/index.htm.

212. "Solicit" is defined as "to directly or indirectly make a request for a contribution, whether express or implied, through any medium. A "solicitation" shall be deemed to have taken place whether or not a contribution is made. For purposes of this article, a "solicitation" or a "solicitation of contributions" includes any advertising which represents that the purchase or use of goods, services, entertainment or any other thing of value will benefit a charitable organization." N.Y. EXEC. LAW, § 173-a-10 (Consol. 2010).

213. N.Y. EXEC. LAW § 171-a-4 (Consol. 2010).

The Persuaders satisfies this definition because its central purpose is to raise contributions[214] for the Global Fund, which it does by establishing and coordinating a donor base through the Red partnership, on the one hand, and by being heavily involved in the co-branding effort to market the Red logo (a proxy of sorts for the Global Fund) and Red-labeled items to consumers, on the other. More specifically, the Persuaders can be mapped onto the definition set out above, starting from the premise that the Persuaders has a contract in place with the Global Fund:

> (a) (i) It manages, conducts, carries on, and assists in connection with charitable solicitation on behalf of the Global Fund by securing and negotiating agreements with the Partners and engaging with the Partners to solicit from New York consumers. It also oversees the implementation of the agreements between itself and the Partners and the Partners and the Fund;[215]
>
> (ii) Under the umbrella name "Red," the Persuaders also engages and holds itself out to be engaged in the business of soliciting for the Global Fund (and is widely perceived to be doing so) through the Red website, which, aside from advertising labeled products and marketing the cause also provides a portal allowing visitors to donate directly to the Global Fund; through the organization of traditional fundraising events such as the Sotheby's art auction, or a concert series where a portion of the ticket sales is sent to the Global Fund; and through engaging celebrity sponsors to disseminate the Red message.[216]

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214. In the New York state solicitation statute, contribution is defined as "[t]he promise or grant of any money or property of any kind or value, whether or not in combination with the sale of goods, services, entertainment or any other thing of value, including a grant or other financial assistance from any agency of government, except payments by members of any organization for membership, for services or other benefit, other than the right to vote for directors or trustees, elect officers, or hold offices." *Id.*

215. Recall that the Persuaders selects the Partners, that they negotiate the pledge amounts to the Global Fund, and that they also have the right to audit the Partners to ensure compliance with the agreements.

216. Bono and Shriver make TV appearances on shows like Oprah to promote the Red brand and the cause, and enlist celebrities to ask their fans to support the Red brand and campaign. *See, e.g.*, (Blog) Red, Free, Exclusive

> Note too that the (Product)$^{\text{Red}}$ trademark is registered for "fundraising for charitable purposes."[217]
>
> (b) Any solicitation to the Partners or to consumers through the Red model is carried out on behalf of a charitable organization, namely the Global Fund, which is a registered charity in the state of New York.
>
> (c) Through the website and other promotional means, including events such as auctions and concerts, the Persuaders advertises that the purchase of Red-labeled items will benefit the Global Fund.

Like any fundraiser, the Persuaders acts as a middleman between a charity and its donors (here the Partners and, through them, consumers), and its role is to raise funds from the latter on behalf of the former. The fact that it has only one client does not change the Persuaders' function as the fundraising coordinator in the Red model. Furthermore, fundraising, largely via branding (especially now that the line between the two has become increasingly blurred), is the Persuaders' main activity: its central purpose is to sell, disseminate, market and strengthen the Red brand, which in turn serves to increase donations to the Global Fund by generating commercial and reputational benefits for the Partners. As discussed earlier, the Global Fund could have internalized the Red label or licensed out the rights to use its own logo to various corporations. There are several possible reasons why it chose instead to help establish Red as an external program and to outsource a large portion of the private-sector fundraising responsibilities to the Persuaders. A particularly appealing feature of this model is that the Persuaders sustains itself with

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Access to John Legend from Gap & (RED), Jul. 29, 2009, http://blog.joinred.com/2009/07/free-exclusive-access-to-john-legend.html. This is just one instance of Red being advertised not by a Partner but rather through an *ad hoc* partnership with The Persuaders. (RED)Nights is a concert series dedicated to fundraising for the Global Fund. The Persuaders also organizes fundraising events such as a pop-up (RED) store that sells only Red-labeled merchandise, as mentioned *supra* note 51. At a more basic level, when consumers buy a Red Gap t-shirt, they are buying it because it is Red, not just because it is Gap—this is the point of the Red branding effort, and it reveals a direct relationship between consumers and a brand that is owned and marketed by the Persuaders.

217. Find Owner Search, Brand Search Results for "(product) red," http://www.findownersearch.com/product-red-4815878.html (last visited Mar. 5, 2010).

licensing fees, so the Global Fund benefits without having to divert donations to cover additional overhead costs or fundraiser fees.

This last point brings us to an important reason why the Persuaders is currently excluded from the definition of PFR. The first part of the PFR definition states that fundraisers carry out their activities "for compensation or other consideration." Implicit in this criterion is that the compensation or consideration comes from the charity on whose behalf the fundraiser is working. The Persuaders does not, however, receive any compensation directly from the Global Fund to fundraise on its behalf. As highlighted, no money flows from the Global Fund to the Persuaders. However, the Persuaders certainly benefits from its relationship with the Global Fund. First, it has a contractual and marketed affiliation with the Fund, from which it derives support and legitimation. Without that, Red would not exist or work. Additionally, the Persuaders receives financial compensation in the form of licensing fees paid by the Partners. Those fees finance the Persuaders' fundraising work. New York regulators should therefore interpret the licensing fees and the structural affiliation with the Global Fund as amounting to "compensation or other consideration" under the definition of PFR and regulate the Persuaders accordingly.[218]

Regulating the Persuaders as a PFR would ensure disclosure of the agreement between the Persuaders and the Global Fund, as well as disclosure of the licensing fees paid by the Partners.[219] Indeed, in addition to registering with the Charities' Bureau, which includes disclosure of organizing documents, PFRs must also file a copy of their contracts with chari-

218. There is no case law (or regulatory advice) on whether licensing fees satisfy the compensation or other consideration criterion; however, as mentioned, a conservative interpretation of the definition requires that it come directly from the charity (and not another for-profit entity as is the case here). It is evident, however, that the Red model works by outsourcing significant fundraising functions to the Persuaders, and by outsourcing the payment of fundraiser fees to the Partners. In other words, the licensing fees serve the same function as fundraiser fees and should be used in the place of traditional fundraiser fees to meet the definition.

219. The fees could be disclosed as an aggregate figure if there is a legitimate business interest in keeping the individual licensing fees confidential.

ties.[220] These contracts are available to the public and must include, among other things, a clear narrative description of the services to be performed and a clear statement of the financial arrangement between the charitable organization and the PFR.[221] This information is required in part to ensure that there are checks to prevent PFRs from embezzling funds (which is not a real concern with the Persuaders, as it does not receive any of the funds destined for the Global Fund) and also to indicate what share of the moneys raised for charity are designated as fundraiser fees.[222] For the public, access to information concerning the amounts retained by fundraisers relative to the amounts retained by charities is extremely valuable, as it allows for an assessment of different programs' efficiency and legitimacy.

Treating the Persuaders as a PFR and expanding the disclosure requirements applicable to co-venturers would provide regulators and the public with access to (1) the agreements between the Persuaders and the Global Fund, which would ideally include descriptions of the Partner-selection process, the coordination functions of the Persuaders, any conditions pertaining to the use of the charity's logo, and any social commitments undertaken by the Partners; (2) the amount of licensing fees paid to the Persuaders, which should be treated as fundraiser fees and reported as required by the New York Executive Law;[223] (3) the Agreements between the Fund and the

220. N.Y. Exec. Law § 173-a-1.

221. *Id.* § 174-a; *see also* N.Y. State Dep't. of Law, Charities Bureau, CHAR009 - Summary of Registration and Filing Requirements for Professional Fund Raisers, Professional Solicitors, Fund Raising Counsel and Commercial Co-Venturers, pt. VII (2010), *available at* http://www.charitiesnys.com/fund_raising_professionals_new.html.

222. While the First Amendment of the U.S. Constitution bars legislators from setting limits on fundraiser fees (because this type of speech is viewed as protected), it does not bar disclosure requirements, which serve a crucial informational purpose. *See* Illinois *ex rel.* Madigan v. Telemarketing Assoc., 538 U.S. 600, 606 (2003).

223. "Within ninety days after the termination of any such contract, the professional fund raiser shall file with the attorney general a closing statement . . . . Such statement shall disclose gross revenue, all expenditures incurred in the performance of the contract, and all funds paid to the professional fund raiser and charitable organization. In the event that a contract term is longer than a one year period, the professional fund raiser shall file an interim statement, at least annually." N.Y. Exec. Law § 173-a.

co-venture Partners as recommended in the previous subsection; and (4) the Partners' annual accounting reports.

Another possibility is to view the Persuaders as a commercial co-venturer, along with the Partners. Here the argument is that the Persuaders contracted with the Global Fund to market a product, the Red brand, and to grow its business and assets through licensing.[224] In return for the right to leverage its relationship with the Global Fund, the Persuaders provides the service of matching the Fund with corporate donors. If this interpretation of the arrangement between the Global Fund and the Persuaders were accepted, and if the above recommendations concerning co-venturers were implemented, the law would require disclosure of the agreement between the Global Fund and the Persuaders. Additionally, the licensing fees would be disclosed as part of the Persuaders' accounting statement, with the licensing agreements being listed as 'items sold'. The charitable transfers being paid to the Global Fund would be captured by the financial commitments secured in each licensing agreement.

With these expansions of New York's Executive Law, which are centered around increased transparency, the public would know much more about how Red and similar initiatives work,[225] what their true potential is for raising money for worthy causes, and, crucially, how much it costs to raise that money. This knowledge would in turn allow for more accurate performance assessments of different fundraising models, which would in turn serve to better inform purchasing as well as charitable decisions. Further, new types of commercial/philanthropic actors such as the Persuaders would be brought into the regulatory fold, which would enhance regulators' abil-

224. As mentioned in Note 30, in an entry reviewing an earlier draft of this article on William Easterly's blog, Aid Watch, Susan Smith Ellis explained that the company's corporate charter requires that all profits earned be transferred to the Global Fund. William Easterly & Laura Freschi, *Cui Bono? The Murky Finances of Project (Red)*, AIDWATCH, Dec. 8, 2009, http://aidwatchers.com/2009/12/cui-bono-the-murky-finances-of-project-red%E2%84%A2/. To date, no transfers have been made, however. This suggests that the company does not make any profits and uses the licensing fee revenue to cover overhead costs, including salaries. Nevertheless, the fact that there is an avenue for revenue transfer can also serve to strengthen the commercial co-venturer analogy.

225. As noted earlier, likely through the filters of charity watchdog groups, the media, and academia.

ity to protect consumers and charities and ensure greater soundness within the CRM industry. Finally, charities would have more information with which to better leverage their own negotiating positions in transactions with businesses; this would also help them to protect their reputations and maintain public trust.[226]

VII. Conclusion

There is little doubt that the Red fundraising machine is quite powerful, having exponentially multiplied contributions from the private sector to the Global Fund. And yet many worry about its negative potential to provide only superficial solutions to deep socio-ethical problems, depoliticize aid, and put the public's already shaken trust more at risk by promoting profit motives in a philanthropic context. Whether or not these concerns resonate, the lack of transparency surrounding this initiative and other CRM programs is viewed as being problematic across the board. Opacity impairs performance assessments and has worrisome ramifications for ensuring consumer protection. Additionally, where the public's philanthropic spirit is being leveraged, opacity in charitable activities risks jeopardizing nonprofits' most important asset: trust. Without trust, philanthropy's foundations become less stable and its beneficiaries less well-served.

This paper suggests a few regulatory solutions for mitigating these risks without creating excessive burdens or chilling business's ability to participate in CRM and similarly socially-minded programs. At the same time, it urges regulators, charities, and corporations with an interest in innovative models like Red to assume commensurate responsibility in situations where businesses slip out of the private realm and into the philanthropic sphere. Businesses typically report to shareholders for accountability purposes. But when they cross over into charitable activities, that accountability base expands to include a much broader segment of the public. And while the blogosphere and campaigns like buylesscrap.org can certainly act as informal regulatory forces, government regulators need to step in and ensure that rules are updated and enhanced in order to safeguard the public interest and charity generally.

226. *See* A.G. Report, *supra* note 161, at 33.

With more transparency, charities may find themselves in a stronger negotiating position vis-à-vis potential corporate partners. This in turn could help to temper some of the concerns around corporate cause-capture and possible disproportions between profits, marketing expenses, and charitable contributions. Additionally, more transparency may result in greater competition within the CSR realm by encouraging corporations to increase and deepen their philanthropic and social commitments. The possibilities for increasing the double bottom-line would expand for corporations inclined to flex their philanthropic muscle, and initiatives like Red could go about their mission of saving lives while generating profits with a steadier stride.