SOCIAL MEDIA AND CROWDFUNDING—LEGAL ISSUES FOR SECTION 501(c)(3) ORGANIZATIONS

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The use of social media and crowdfunding by Section 501(c)(3) tax-exempt organizations can create legal issues for the organizations, including the risk of violating (1) the federal tax law prohibition of political campaign intervention and (2) state fundraising regulations.

Over the better part of the last decade, both the nonprofit ecosystem and the traditional nonprofit's life cycle have been significantly impacted by the proliferation of social media. At its core, social media is the epitome of hyper-efficient mass-networking and mass-promotion. According to the Pew Research Center, 69 percent of the public uses some form of social media,[1] with such usage being predominately associated with eight different platforms.[2] Moreover, the median American uses three of these eight platforms and many users visit multiple sites daily.[3]

Use of social media by nonprofit organizations

Certainly, social media is also utilized by nonprofit organizations, including organizations that are tax-exempt via Section 501(c)(3).[4] For example, National Geographic Society has over 45 million "Likes" on Facebook, while Amnesty International USA has over 4 million followers on Twitter and National Public Radio has over 1 million followers on Instagram. Even much smaller organizations are able to garner strong support in their local communities through these 24/7/365 mediums of networking and promotion.

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However, the use of social media creates a newer form of a longstanding problem for these organizations that are strictly regulated by the IRS and other governmental arms: attribution. As a result of this problem, a nonprofit organization may be held accountable for the actions of individuals when they rush to "press send" or "post" without considering the issue. For many individuals—and ostensibly all organizational leaders—it may be the case that social media musings are actually interpreted by the IRS and other regulators to be on behalf of the organizations themselves. In several areas of the law, this attribution can have serious ramifications for nonprofit organizations.

The purposes of this section of the article are to highlight a dangerous area of the law in which organizations experience problematic attribution and to describe ways in which this unwanted attribution may be avoided or, if necessary, mitigated.

General prohibition of political campaign intervention. A practitioner need not look far to review the Code's position on political campaign intervention by 501(c)(3) organizations. Within Section 501(c)(3) itself, the Code provides that an entity may only obtain and maintain such exemption if it "does not participate in, or intervene in (including

the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."

For a violation to result, two criteria must be in existence. First, there must be a candidate for public office. The term "candidate for public office" means an individual who offers himself, or is proposed by others, as a contestant for an elective public office, whether such office be national, state, or local.[5] Second, there must be participation or intervention. This inquiry is generally a facts and circumstances test.[6] However, the IRS has provided examples of and discussion related to various arrangements of facts and circumstances that may, or may not, constitute participation or intervention.[7] For purposes of simplicity, a 501(c)(3) organization should be mindful of instances of endorsing candidates, grading candidates, providing resources to campaigns, supporting or opposing party platforms, and providing internet links to candidate content.[8]

The ban on political campaign intervention is not within a gray area like its lobbying counterpart. While a 501(c)(3) organization is free to engage in an insubstantial amount of lobbying,[9] the ban on political campaign intervention is absolute.[10]

Depending on the nature of the intervention, the IRS may issue an adverse determination to revoke a 501(c)(3) organization's exempt status,[11] which determination may be upheld by a court of competent jurisdiction.[12] Notwithstanding this threat, the excise tax under Section 4955 is generally regarded as the more appropriate punishment for 501(c)(3) organizations that trip over the ban without sufficiently high egregiousness and without becoming serial violators. Under that excise tax, a 501(c)(3) organization must pay a tax equal to 10 percent of the amount of each political expenditure,[13] while organization managers who act with requisite knowledge and culpability must pay a tax equal to 2.5 percent thereof.[14] Both of these figures increase in the event that a correction is not consummated.[15] Finally, even though these expenditures present the opportunity for certain overlap, Section 4955 takes precedence over the excise taxes under Sections 4945 and 4958.[16]

Social media use and political campaigns

It is safe to assume that the general rules apply to a 501(c)(3) organization's presence on social networking sites.[17] If a 501(c)(3) organization posts something on its website that favors or opposes a candidate for public office, "the organization will be treated the same as if it distributed printed material, oral statements or broadcasts that favored or opposed a candidate."[18] Of course, because the analysis evaluates all of the facts and circumstances, other actions could be indicative of political campaign intervention. For example, should a nonprofit desire to follow a candidate for public office on Twitter, it could raise a red flag if it does not follow other candidates.[19]

The IRS has routinely published consistent positions with respect to the related topic of a 501(c)(3) organization's utilization of website links. As stated in Rev. Rul. 2007-41, "An organization has control over whether it establishes a link to another site. When an organization establishes a link to another web site, the organization is responsible for the consequences of establishing and maintaining that link, even if the organization does not have control over the content of the linked site." Because the organization has such control, the IRS continues, the organization is responsible for the "consequences of establishing and maintaining that link, even if the organization

1 Pew Research Center, "Social Media Fact Sheet," www.pewinternet.org/fact-sheet/social-media/.

2 Pew Research Center, "Social Media Use in 2018," www.pewinternet.org/2018/03/01/social-media-use-in-2018/.

3 *Id.*

4 This article will refer to such tax-exempt organizations as "501(c)(3) organizations."

5 Reg. 1.501(c)(3)-1(c)(3)(iii).

6 Reg. 1.501(c)(3)-1(c)(3)(iv).

7 See generally Rev. Rul. 2007-41, 2007-1 C.B. 1421.

8 For more information, see generally IRS Fact Sheet 2006-17, "Election Year Activities and the Prohibition on Political Campaign Intervention for Section 501(c)(3) Organizations," www.irs.gov/newsroom/election-year-activities-and-the-prohibition-on-political-campaign-intervention-for-section-501c3-organizations.

9 Section 501(c)(3).

10 *Dykema*, 666 F.2d 1096, 1101 (CA-7, 1981) (stating that political campaign intervention "need not form a substantial part of the organization's activities.").

11 See, e.g., Ltr. Rul. 201416011. For additional background, see Korte, "IRS revokes group's tax exemption over anti-Clinton statements," USA Today, 4/21/14, www.usatoday.com/story/news/politics/onpolitics/2014/04/21/hillary-clinton-tax-exemption-revoked/81540636/.

12 *Association of Bar of City of New York*, 858 F.2d 876 (CA-2, 1988), cert. denied, 490 U.S. 1030 (1989).

13 Section 4955(a)(1).

14 Section 4955 (a)(2).

15 Section 4955(b).

16 Section 4955(e).

17 See Allen Mattison, "Friends, Tweets, and Links: IRS Treatment of Social Media Activities by Section 501(c)(3) Organizations," 5 The Exempt Org. Tax Rev. 67, 445 (May 2011); IRS Fact Sheet 2006-17, *supra* note 8 ("[A] website is a form of communication.").

18 Rev. Rul. 2007-41, *supra* note 7.

19 See generally Brantley, "Beyond Politics in the Pulpit: When Pastors use Social Networks to Preach Politics," 38 J. Legis. 275, 289 (2012).

20 IRS Fact Sheet 2006-17, *supra* note 8.

does not have control over the content of the linked site."[20]

In fact, the IRS has stated that it would consider the following factors when viewing links on a website: (1) the context for the link on the organization's web site, whether all candidates are represented; (2) any exempt purpose served by offering the link; and (3) the directness of the links between the organization's web site and the web page that contains material favoring or opposing a candidate for public office.[21]

Attribution principles

A common analogy used by law professors teaching classes on business associations centers around the wearing of "hats." In this analogy, an individual wears one hat when acting for Corporation A and switches hats when acting for Corporation B. The analogy is intended to show the importance of the literal shift from one entity to the other: the removal and replacement of hats. In this context, attribution is similar to the hat switching analogy.

Conceptually, the idea of attribution is simple. When do you know that a speaker is speaking individually versus speaking in her capacity within the 501(c)(3) organization? Obviously, there are instances when the latter is fully intended. However, the goal of this discussion is to navigate situations when the latter is wholly unintended. "Problems may arise when employees' use of social media platforms blends their work and personal lives," which is a goal for most 501(c)(3) organizations, but obviously creates division "with the separation required for IRS compliance."[22] This problem, or at least the opportunity for this problem, is commonplace.[23]

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Immediately following the foregoing general outline of attribution is probably a good place to quickly touch on what some readers may now be screaming: free speech. The purpose of this article is not to comprehensively discuss the merits of such an argument. However, a discussion of attribution in this context would not be complete without a short discussion. To its credit, the IRS makes clear that "the political campaign intervention prohibition is not intended to restrict free expression on political matters by leaders of organizations speaking for themselves, as individuals. Nor are leaders prohibited from speaking about important issues of public policy. However … leaders cannot make partisan comments in *official organization publications* or at *official functions of the organization.*"[24] Again, we get back to our hat analogy, which serves as a basis for explaining both the groundwork for attribution and an individual's ability to exercise free speech without triggering a violation through her role with the 501(c)(3) organization.

Identifying likely instances of attribution

When does attribution occur? The answer generally depends on the individual's role within the 501(c)(3) organization. With respect to officials like directors and officers, the IRS essentially requires a disclaimer through which the officials "make it clear that they are acting in their individual capacity, that they are not acting on behalf of the organization, and that their association with the organization is given for identification purposes only."[25] However, if such a disclaimer is not provided, attribution is the default rule "since the organization typically acts through its officials."[26] Accordingly, the rule for officials is to disclaim, disclaim, disclaim—per the IRS, "when an official of an IRC 501(c)(3) organization endorses a candidate somewhere other than in the organization's publications or at its official functions, and the organization is mentioned, it should be made clear that such endorsement is being made by the individual in his or her private capacity and not on the organization's behalf."[27]

The IRS provides the following example: "Organization shown for identification purposes only; no endorsement by the organization is implied."[28] Notwithstanding this opportunity to disclaim, even a disclaimer is not sufficient to avoid attribution for statements made in a 501(c)(3) organization's publication or at its official function.[29] Accordingly, the official Twitter feed of a 501(c)(3) organization is not the appropriate medium for the CEO to release a political statement, irrespective of a disclaimer contained in the problematic tweet.[30] However, if the same CEO tweets out the statement on her personal Twitter feed, then, provided a sufficient disclaimer is included within the tweet or on the page generally, attribution may be avoided (absent other

bad facts or circumstances negating the disclaimer). Thus, keeping within our hat analogy, it is vitally important that organization leaders take their organizational hats off when making political statements.

Examples

The IRS has published guidelines with respect to these officials. The following examples serve as important factual scenarios and offer direction to 501(c)(3) organizations. These can be used to set a tone for modern-day situations involving social media.

1. With the permission of five prominent healthcare industry leaders, including the CEO of a local hospital that is a 501(c)(3) organization, who have personally endorsed a candidate for public office, such candidate publishes a full page ad in the local newspaper listing the names of the five leaders. The CEO of a local hospital is identified in her capacity as CEO of the 501(c)(3) organization. The ad states, "Titles and affiliations of each individual are provided for identification purposes only." The ad is paid for by the candidate's campaign committee. Because the ad was not paid for by the hospital, the ad is not otherwise in an official publication of the hospital, and the endorsement is made by the CEO in a personal capacity, the ad does not constitute campaign intervention by the hospital.[31]
2. A local university that is a 501(c)(3) organization publishes a monthly alumni newsletter that is distributed to all alumni of the university. In each issue, the university's president has a column titled "My Views." The month before an election, the president states in the "My Views" column, "It is my personal opinion that Sally Smith should be reelected." For that one issue, the president pays from his personal funds the portion of the cost of the newsletter attributable to the "My Views" column. Even though he paid part of the cost of the newsletter, the newsletter is an official publication of the university. Because the endorsement appeared in an official publication of the university, it constitutes campaign intervention by the university.[32]
3. The minister of a local church, which is a 501(c)(3) organization, is well known in the community. Three weeks before an election, he attends a press conference at a candidate's campaign headquarters and states that the candidate should be reelected. The minister does not say he is speaking on behalf of the church. His endorsement is reported on the front page of the local newspaper and he is identified in the article as the minister of the church. Because he did not make the endorsement at an official church function, in an official church publication, or otherwise use the church's assets, and did not state that he was speaking as a representative of the church, his actions do not constitute campaign intervention by the church.[33]
4. The chairman of the board of directors of a 501(c)(3) organization that educates the public on conservation issues spoke on a number of issues during a regular meeting of the organization shortly before the election, including the importance of voting in the upcoming election, and concluded by stating, "It is important that you all do your duty in the election and vote for Sally Smith." Because the chairman's remarks indicating support for Sally Smith were made during an official organization meeting, they

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[21] *Id.*

[22] Mattison, *supra* note 17 at 453.

[23] Most 501(c)(3) organizations "strongly encourage, if not require, their employees to use their personal social media pages to promote organizational activities. . . . Many 501(c)(3) organizations pay their communications staff to maintain Facebook pages and Twitter feeds on behalf of the organization's senior executives." *Id.*

[24] IRS Fact Sheet 2006-17, *supra* note 8 (emphasis supplied).

[25] IRS, 2002 EO CPE Text, "I. Election Year Issues," p. 364, https://www.irs.gov/pub/irs-tege/eotopici02.pdf.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.* TAM 200446033 ("In particular, when officials of a Section 501 (c)(3) organization engage in political activity at official functions of the organization or through the organization's official publications, the actions of the officials are attributed to the Section 501(c)(3) organization.").

[30] See IRS Publication 1828, p. 8, Ex. 3.

[31] Rev. Rul. 2007-41, *supra* note 7, Situation 3.

[32] Rev. Rul. 2007-41, *supra* note 7, Situation 4.

[33] Rev. Rul. 2007-41, *supra* note 7, Situation 5. This example may be difficult to reconcile with the IRS's position in the 2002 CPE Text that officials should use disclaimers by default. However, it should be noted that the fact pattern does not suggest that this official self-identified; rather, it states that a newspaper identified him as being associated with the church. Accordingly, this fact pattern lacks a voluntary association with the organization, even when he was well known in the community.

[34] Rev. Rul. 2007-41, *supra* note 7, Situation 6.

constitute political campaign intervention by the organization.[34]

Although these examples pre-date the more recent exponential increases in social media usage, they can be used to highlight examples within the social media context. Some of these examples leave us with hunches, while others have received input from the IRS. While these examples are drawn from real-world situations, biographical identifiers have been intentionally removed.

1. A candidate running for a U.S. Senate seat tweets a video of an individual who is a small business owner, veteran, community leader, and the president of a small 501(c)(3) organization. In the video, the individual is identified by reference to all of these "hats." However, the video is objectively an attempt to show that the candidate is working for small business owners and veterans. Because the video was not paid for by the 501(c)(3) organization, the video is not otherwise published by the 501(c)(3) organization's social media platforms, and the endorsement is made by the individual in a personal capacity, the video is not likely to constitute campaign intervention by the 501(c)(3) organization. But what if the individual, who lists his title on his Twitter feed, retweets the video? And what if the organization retweets the video? These evolutions of the example may show the difference between a retweet capable of disclaimer and a retweet incapable of disclaimer.
2. A 501(c)(3) organization maintains a blog. When a blog entry is authored, the individual who authored the entry signs his or her name. Blog entries are made by individuals on their personal computers and without the use of any organizational resources or facilities. The president of the organization makes several blog posts and alerts that are generally opposed to a certain party's candidates and even include a common identifier of "Stop [Candidate] Now." The IRS ruled that the organization violated the political campaign intervention limitation because the organization itself published these statements in its official blog. It was not relevant that they were signed by a particular official of the organization.[35]
3. This situation is probably best demonstrated by the hypothetical question from above in which the president of the small 501(c)(3) organization retweets the video from his personal account. His status as being "well known" may be evidenced by the number of followers he has on Twitter. To be perfectly in line with the IRS's position, his Twitter page would not reference his status with the organization. If it did reference such status, then a disclaimer should be used.
4. This situation is probably best demonstrated by the hypothetical question from above in which the small 501(c)(3) organization itself retweets the video from its organizational account. The organization's Twitter account constitutes an organizational communication and will be viewed as political campaign intervention.

If a 501(c)(3) organization posts something on its website that favors or opposes a candidate for public office, the organization will be treated the same as if it distributed printed material, oral statements, or broadcasts that favored or opposed a candidate.

Different standards will apply to employees and members of a 501(c)(3) organization. In this context, the IRS maintains that attribution results when there is a real or apparent authorization by the 501(c)(3) organization of the actions of the employees or members.[36] In general, the principles of agency will be applied to determine whether an individual engaging in political activity was acting with the authorization of the 501(c)(3) organization.[37] Accordingly, the "actions of employees within the context of their employment generally will be considered to be authorized by the organization."[38]

Inaction may also lead to attribution with respect to employees and members of a 501(c)(3) organization. According to the IRS, there will be attribution for actions not captured by the law of agency if the organization explicitly or implicitly ratifies the actions.[39] Therefore, 501(c)(3) organizations must not fail to disavow the actions of individuals under apparent authorization, which failure may be considered a ratification of the actions. To be effective, the disavowal must be timely and equal to the original actions and the organization must take steps to ensure that such unauthorized actions do not recur.[40]

However, not all individuals affiliated with a 501(c)(3) organization are attributional threats. For example, students are not generally attributed to an educational institution, which is why the IRS ruled that the individual political campaign activities of students should not be attributed to their university in one setting.[41] However, the IRS

subsequently pointed out that if the faculty members specified the candidates on whose behalf the students should campaign, "the actions of the students would be attributable to the university since the faculty members act with the authorization of the university in teaching classes."[42] Moreover, the political campaign activities of individual members of a 501(c)(3) organization were attributable when the organization's publication stated that the organization would be sending members to work on the campaign, the members identified themselves as representing the organization, and officials made no effort to prevent the members' activities.[43]

Irrespective of one's role within the 501(c)(3) organization, certain facts and circumstances are always problematic. An individual who utilizes the organization's financial resources, facilities, or personnel will generally be attributed to the organization for political campaign intervention purposes.[44] For these purposes, a 501(c)(3) organization's resources include intangible assets, such as its logos, trademarks, and goodwill.[45]

Organizational attribution

In addition to attribution through individuals, 501(c)(3) organizations must be cognizant of attribution through other organizations, including other nonprofit organizations. One murky area for 501(c)(3) organizations extends beyond the content on their social media postings and websites to the content on the social media postings and websites of organizations to which the 501(c)(3) organization provides links. In deciding whether attribution is appropriate, the IRS will evaluate the context for the link on the organization's web site, any exempt purpose served by offering the link, and the directness of the links to material favoring or opposing a candidate for public office.[46] The IRS "will pursue the case if the facts and circumstances indicate that the section 501(c)(3) organization is promoting, encouraging, recommending or otherwise urging viewers to use the link to get information about specific candidates and their specific issues."[47]

Another attributional concern arises when 501(c)(3) organizations share social media accounts or websites with affiliated non-501(c)(3) organizations—for example, a 501(c)(3) organization that is affiliated with a business league or a social welfare organization. The IRS found that a 501(c)(3) organization engaged in impermissible activity because its website nested pages for its affiliated social welfare organization.[48] In that situation, the 501(c)(3) organization's logo appeared on every page, even though the social welfare organization's pages also bore its logo, and the layout of every page was identical. In the end, even though the social welfare organization paid its pro-rata share for website expenses, the IRS found that the 501(c)(3) organization engaged in political campaign intervention by hosting the endorsements on its website.

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Coordination with social media and other electronic mediums

To date, there has not been significant guidance from the IRS with respect to the precise application of these rules to pure social media platforms. As a result, most of the application to social media must be drawn from other contexts, most notably from rulings and regulation in and around websites and electronic communications. Notwithstanding the dearth of binding or even persuasive authority, all 501(c)(3) organizations should assume that their use and their officials and employees' use of social media platforms will absolutely be held to the same standards, including the threat of attribution.

At its core, the prohibition applies to supporting or opposing political actors. Within the context of social media, 501(c)(3) organizations must recognize that support and opposition may be indicated in

35 Ltr. Rul. 201416011.
36 IRS, 2002 EO CPE Text, *supra* note 25 at 364.
37 *Id.*
38 *Id.* at 364-65.
39 *Id.* at 365.
40 *Id.*
41 Rev. Rul. 72-512, 1972-2 C.B. 246.
42 IRS, 2002 EO CPE Text, *supra* note 25 at 365.
43 GCM 39414 (2/29/84).
44 IRS, 2002 EO CPE Text, *supra* note 25 at 363-64.
45 *Id.* at 369.
46 IRS Fact Sheet 2006-17, *supra* note 8.
47 Memorandum from Lois G. Lerner, Director, IRS Exempt Organizations Division, 4/17/08, p. 2, https://www.irs.gov/pub/irs-tege/2008_paci_program_letter.pdf.
48 TAM 200908050.

ways other than through postings alone. For example, by adding a friend or liking someone on Facebook, following a feed on Twitter, or subscribing to an Instagram page, a 501(c)(3) organization is publicly proclaiming an interest in the postings of others. Granted, an argument could be made that this is done for monitoring purposes alone (which could genuinely relate to the organization's tax-exempt purposes); however, the risks should be seriously weighed when deciding if there is an overwhelming benefit from publicly proclaiming this interest.

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However, it generally takes two to tango on social media and it is possible for the request, follow, or subscription to be directed at the 501(c)(3) organization. What if the organization received a friend request from a candidate for public office on Facebook or the organization finds that it is followed by that candidate on Twitter? Here, consistency is important. Based on all the facts and circumstances, it should be unlikely that this act alone would be deemed to be the voice of the organization. Accordingly, if the organization always accepts friend requests and never blocks a follower, the organization should have a strong argument that no political campaign intervention has occurred. If, however, the organization objectively manifests favorable treatment with respect to certain candidates or a particular party, the organization may be implying support or opposition, even through actions initiated by others.

Beyond these risks, the primary risk should be obvious and directly analogous to settled law. A 501(c)(3) organization should only discuss incumbents and candidates in social media postings to the extent it would do so in other communications. Since attribution is a threat to all 501(c)(3) organizations, it must closely monitor the postings by those who are potentially attributable to the organization itself. Again, because social media works in two directions, the organization must be mindful of posts by candidates and other persons. Third party political posts to official social media platforms or to those of attributional threats should be immediately deleted or swiftly met with an official comment that the posting does not reflect the organization or the individual's views and that the organization or the individual does not support or oppose the candidate. Again, consistency is paramount in order to avoid implied violations. Just as the IRS views a disclaimer in the organization's official publications as insufficient,[49] an organization should not assume that a general disclaimer on its social media pages will have any effectiveness to avoid attribution through the failure to disavow.

Finally, if organizational resources are used for the maintenance of an official's "personal" social media pages, the organization should treat those just as it does its own pages. For example, if an organization's staff maintains the president's Instagram account, the account will be deemed to be an organizational account through attribution. The use of organizational resources will almost always cause attribution. Consequently, the Instagram account should never be used to support or oppose a candidate for public office.

Recommendations for social media policy

The overwhelming recommendation for 501(c)(3) organizations seeking to avoid unwanted attribution is to establish written guidelines regulating the use of social media by persons associated with the organization. These guidelines could be in an employee manual or in a standalone social media policy. It is prudent to redistribute these guidelines annually, usually at the beginning of each relevant election cycle.

However, not all issues can be kept in-house through such guidelines. The content below contains recommendations for rules that should be incorporated into these guidelines and recommendations that aid organizations in avoiding attribution from third parties. Not all recommendations will fit neatly within a social media policy, and it is the organization's ongoing responsibility to ensure that the applicable representatives of the organization are aware of threats that cannot practically be dealt with in the organizational policy. Thus, the more complete general recommendation is to have both a policy and to engage in regular training (with respect to both the content in the policy and the content that is outside of the policy).

[49] IRS, 2002 EO CPE Text, *supra* note 25 at 363. TAM 200446033 ("In particular, when officials of a Section 501 (c)(3) organization engage in political activity at official functions of the organization or through the organization's official publications, the actions of the officials are attributed to the Section 501(c)(3) organization.").

[50] Memorandum from Lois G. Lerner, *supra* note 47 at 2.

Notwithstanding these recommendations, it is vitally important for 501(c)(3) organizations to consult with employment counsel. In many instances, local law impacts the organization's ability to wield the types of control recommended in this article. For example, while an organization may be able to shut down an employee's political speech that supports or opposes a candidate for public office during working hours (including through social media), the organization may not be able to restrict political speech that relates to labor or working conditions.

The following are specific recommendations for policies on use of social media:

1. In an ideal world, the organization would prohibit the use of all organizational resources in accessing social media platforms for personal purposes. This would include computers and organization-provided phones and tablets. Obviously, this would not apply to any of the organization's social media accounts or any "personal" accounts for organization officials that are actually maintained by the organization. For practical purposes, however, this may not be desirable or may be seen as overly totalitarian.
2. In the event that social media may be permissibly accessed through organizational resources (or that the organization learns of impermissible access), organization officials and employees should be informed in writing that any activity—whether it is posting, liking, following, etc.—that tends to support or oppose a candidate for public office may not be carried out using organizational resources. In the event such an act occurs, the organization should request that the impermissible act be unwound or the organization should affirmatively move to disavow the act.
3. Require that all organization officials who have social media accounts list a disclaimer like the following: "Organization shown for identification purposes only; no endorsement by the organization is implied." However, an organization that maintains "personal" accounts for organization officials must be cognizant of the fact that a disclaimer is not sufficient when organizational resources are used. Accordingly, any of these accounts must never take an action that tends to support or oppose a candidate for public office.
4. Prohibit employees from taking any action that tends to support or oppose a candidate for public office while conducting organizational business. Employees should not be permitted to do so during working hours or while on organizational business. In the event such an act occurs, the organization should request that the impermissible act be unwound or the organization should affirmatively move to disavow the act.
5. With respect to potential implied indicia of support or opposition (e.g., liking, following, subscribing, etc.), make sure to be consistent. If the organization takes a specific course of action (e.g., accepting all friend requests), then it must do so without indicating support or opposition.
6. When providing links to another organization's content, ensure that there is no indication that the link is being provided because it supports a political message and attempt to separate the landing page from the political content by requiring the clicking of intervening links. "[E]lectronic proximity—including the number of 'clicks' that separate the objectionable material from the 501(c)(3)'s website—is a significant consideration."[50] If links are provided for tax-exempt purposes (e.g., voter education guide that provides links to all candidates' Twitter feeds or websites), use context to describe why the links are provided and avoid language that supports or opposes a particular candidate. Constant monitoring is required to make sure that external content available through links provided by the 501(c)(3) organization is not subsequently changed in a way that would violate this prohibition.
7. Avoid sharing social media accounts with affiliated organizations that may not have to abide by the same political limitations.

In general, the principles of agency will be applied to determine whether an individual engaging in political activity was acting with the authorization of t he 501(c)(3) organization.

Consequences of crowdfunding

"Crowdfunding" is a concept that lends itself to a variety of meanings. As it applies to 501(c)(3) organizations—or as it applies to them within this article—it is generally limited to donation crowdfunding (i.e., asking the crowd for a gift), as opposed to reward crowdfunding (i.e., a quid pro quo) or investment crowdfunding (i.e., selling securities

in exchange for investment). This concept is both novel and ordinary. In the novel sense, the literal form of raising money is a newer trend, with websites specifically dedicated to such endeavors and other platforms (including social networking websites) establishing arms for such endeavors. In the ordinary sense, the regulation of crowdfunding within the vacuum of 501(c)(3) organizations is not so dissimilar from older funding, like collecting donations on a website that is accessible from anywhere in the world.

The purpose of this section of the article is to highlight and discuss how the use of this sort of crowdfunding impacts a 501(c)(3) organization's legal requirements related to state registration, usually tied to charitable solicitation regulation.

State regulation of fundraising, generally

Most states have statutory or regulatory provisions governing the ability to fundraise within the state. In this context, the notion of "within the state" is amorphous. In broad strokes, an organization is usually required to register in a particular state if it "solicits" in that state, with the definition of solicitation also varying from state-to-state.[51] For these purposes, solicitation should largely be considered an affirmative act of asking for a contribution that would benefit the organization's mission.

One murky area for 501(c)(3) organizations extends beyond the content on their social media postings and websites to the content on the social media postings and websites of organizations to which the 501(c)(3) organization provides links.

These broad concepts mean that a 501(c)(3) organization should consider any form of fundraising within a state to be solicitation. Accordingly, even the slightest or most innocent action should give the organization pause to consider whether it has responsibilities in a particular state. In the simplest setting, an organization should clearly register in a state where it is domiciled, has a physical presence, and where it targets any fundraising efforts. But these simple settings are not subject for discussion. Instead, it is the gray area that serves as the tail wagging the charitable registration dog.

Guiding principles

Beneficially, the National Association of State Charity Officials developed a set of internet funding guidelines referred to as the "Charleston Principles."[52] The Charleston Principles were prepared to help states develop their own regulatory approach to fundraising through the internet. Approximately 40 states and the District of Columbia rely on the Charleston Principles to determine whether an online presence constitutes a solicitation triggering registration in a state.[53] Over time, states have generally taken the position that organizations located outside of a particular state must register if they use their website to specifically target people in that state, or receive contributions from the state on a repeated and ongoing basis or a substantial basis through its website.

The Charleston Principles assist states in identifying certain criteria to be analyzed; however, they are not, in and of themselves, binding. Thus, while it is certainly beneficial to discuss the Charleston Principles to set the tone for this discussion, a 501(c)(3) organization should not assume that these guidelines are safe harbors or guiding lights. At the most basic level, organizations must understand that it may have a registration obligation even if it does not trigger any of the Charleston Principles. Moreover, just because a fundraising platform is registered does not mean the organization is in some way registered by coordination or otherwise excepted from registration.

Under the Charleston Principles, a 501(c)(3) organization must register in a state under a knowledge, including constructive knowledge, standard. This obligation is triggered if it (1) solicits donations through an interactive website and (2) either (a) specifically targets individuals located in the subject state for solicitation or (b) receives contributions from donors in the state on a repeated and ongoing basis or substantial basis through a website.[54]

The Charleston Principles also capture online promotional activity coupled with "something more." This obligation is triggered if (1) the organization solicits contributions through a site that is not interactive, but either specifically invites further offline activity to complete a contribution or establishes other contacts with that state, such as sending e-mail messages or other communications that promote the website and (2) the organization satisfies (2) in the above-discussed principle.[55]

For many organizations, the definitions are of paramount importance. An interactive website is

"a website that permits a contributor to make a contribution, or purchase a product in connection with a charitable solicitation, by electronically completing the transaction, such as by submitting credit card information or authorizing an electronic funds transfer."[56] Links or redirects to other websites will be disregarded and the capability alone—as opposed to demonstrated use—will render the site interactive.[57]

The key element in most situations involves the active versus passive nature of the plea. Under the Charleston Principles, specifically targeting persons means either (1) to include an express or implied reference to soliciting contributions from that state or (2) to otherwise affirmatively appeal to residents of the state, such as by advertising or sending messages to persons located in the state (electronically or otherwise) when the organization knows or reasonably should know the recipient is physically located in the state.[58] Organizations operating on a purely local basis, or within a limited geographic area, do not target states outside their operating area, if their website makes clear in context that their fundraising focus is limited to that area even if they receive contributions from outside that area on less than a repeated and ongoing basis or on a substantial basis.[59]

As discussed above, however, constructive knowledge can also trigger registration when contributions are actually received on a repeated and ongoing basis or substantial basis through a website. Under the Charleston Principles, a repeated and ongoing basis or a substantial basis means "receiving contributions within the entity's fiscal year, or relevant portion of a fiscal year, that are of sufficient volume to establish the regular or significant (as opposed to rare, isolated, or insubstantial) nature of those contributions."[60] The Charleston Principles call on the states to set, and communicate to the regulated entities, numerical levels at which it will regard this criterion as satisfied.[61] "For example, a state might explain that an entity receives contributions on a repeated and ongoing basis if it receives at least one hundred online contributions at any time in a year and that it receives substantial contributions if it receives $25,000, or a stated percentage of its total contributions, in online contributions in a year."[62]

The overwhelming recommendation for 501(c)(3) organizations seeking to avoid unwanted attribution is to establish written guidelines regulating the use of social media by persons associated with the organization.

This last definition is a place where some states have accepted the call. In Colorado, "repeated and ongoing" means 50+ donations and "substantial" means the lesser of $25,000 or 1% of the organization's total contributions in online contributions from Colorado.[63] In Mississippi, "repeated and ongoing" means 25+ donations and "substantial" means $25,000.[64] In Tennessee, "repeated and ongoing" means 100+ donations and "substantial" means $25,000.[65] Given that only three states have defined "repeated and ongoing" and "substantial," this means that 47 jurisdictions have arbitrary discretion and thresholds for when a 501(c)(3) organization must register when considering delving into the online-donation world.

51 See, generally, Cal. Bus. & Prof. Code section 17510.2 and Ohio Rev. Code section 1716.01(K).

52 National Association of State Charity Officials, "The Charleston Principles: Guidelines on Charitable Solicitations Using the Internet," www.nasconet.org/wp-content/uploads/2018/04/Charleston-Principles.pdf.

53 Richard Levey, "Technology Evolves Fundraising, But Charleston Principles Remain Unchanged," The Nonprofit Times (10/15/14), www.thenonprofittimes.com/news-articles/technology-evolves-fundraising-charleston-principles-remain-unchanged/.

54 Charleston Principle III(B)(1)(b).

55 Charleston Principle III(B)(1)(c).

56 Charleston Principle III(B)(2)(a).

57 *Id.*

58 Charleston Principle III(B)(2)(b).

59 *Id.*

60 Charleston Principle III(B)(2)(c).

61 *Id.*

62 *Id.*

63 Secretary of States, Rules for the Administration of the Colorado Charitable Solicitations Act [8 CCR 1505-9], section 10.1.2, 11/9/12, 12-13, www.sos.state.co.us/pubs/rule_making/CurrentRules/8CCR1505-9Charitable.pdf.

64 Rule 2.08 Determination of Online Solicitation, *Mississippi Charities Act Rules: Promulgated Pursuant to the Mississippi Charitable Solicitations Act*, updated April 2017, 8, available at www.sos.ms.gov/Charities/Documents/Mississippi%20Charities%20Act%20Rules_4%202017.pdf.

65 1360-03-01-.07: Application of Registration Requirements to Internet Solicitation, *Rules of Secretary of State Charitable Solicitations Division: Chapter 1360-03-01: Regulation of the Solicitation of Funds for Charitable Purposes*, 2 (March 2009), https://sharetngov.tnsosfiles.com/sos/rules/1360/1360-03/1360-03-01.20090320.pdf.

66 Fla. Stat. section 496.405 ("a charitable organization or sponsor ... which intends to solicit contributions in or from this state by *any means* or have funds solicited on its behalf by any other person, charitable organization, sponsor, commercial co-venturer, or professional solicitor, or that participates in a charitable sales promotion or sponsor sales promotion, must, *before* engaging in any of these activities, file an initial registration statement, and a renewal statement annually thereafter, with the department."); N.Y. Exec. Law section 172 ("Every charitable organization ... which intends to solicit contributions from persons in this state or from any governmental agency shall, *prior to any solicitation*, file with the attorney general a prescribed registration form...").

67 See, e.g., Cal. Govt. Code section 12599; Mich. Comp. Laws section 400.272(f).

Nevertheless, some states—irrespective of attempting to tie their policies to the Charleston Principles—view even the slightest activity as requiring registration. For example, because of the stringent requirements in New York and Florida, registration is highly suggested prior to any type of online solicitation.[66]

Selecting a platform

While this article is not structured to recommend (or even compare) fundraising platforms, it is important to note that 501(c)(3) organizations must take the structure utilized by the various platforms into consideration. This is because compliance by the platform with any requirements that it may have as a fundraiser under state law may impact the potential for compliance by the organization itself.

Approximately 40 states and the District of Columbia rely on the Charleston Principles to determine whether an online presence constitutes a solicitation triggering registration in a state.

One classification used by states is a professional or commercial fundraiser (a "PCF").[67] In general, a PCF is an individual or entity paid to solicit funds on behalf of a 501(c)(3) organization. A PCF is usually paid a flat fee or a percentage of donations collected in the organization's name. Some factors to consider include (1) whether the website acts as more than just a platform by soliciting for one of the organization's projects; (2) whether the website holds donated funds itself as opposed to using a third-party payment processor; (3) whether the website prepares materials for the solicitation of funds for the organization; (4) fee structures that are based on the amount donated (above and beyond third-party credit card fees); and (5) whether the website allows organizations to pay additional money to place them into a featured status or issue portfolios. Over 40 states require registration and other requirements by a PCF, such as registration, bond, filing of contracts (and mandatory clauses in contracts, such as right to rescind, listing of fee calculation, and the signature of more than one charity official[68]), and disclosures.

Another classification used by states is fundraising counsel. In general, a fundraising counsel is an individual or entity that is paid to advise or assist with the solicitation of contributions on behalf of a 501(c)(3) organization. However, a fundraising counsel does not actually solicit or take custody of any funds. For example, a fundraising counsel might advise an organization on how to tailor its website to raise the most money. Even this less active approach to sourcing donations may require fundraising counsel to register and comply with all regulatory requirements.[69]

Another classification used by states is a commercial co-venturer (a "CCV"). In general, a CCV is an entity that advertises that the purchase of a good or service will benefit a certain purpose or a charitable organization. Some states require a CCV to register, while some states simply have a notice requirement.[70] In this context, many of the laws impose obligations that relate to adequate disclosures in favor of the organizations and the public donor base.[71]

Why does this matter to the 501(c)(3) organization? Simply, compliance begets compliance. A 501(c)(3) organization must always make sure that any crowdfunding mechanism is in compliance with applicable law. For example, in California an organization is not permitted to contract with an unregistered commercial fundraiser to solicit for charitable purposes, which creates a penalty not only for the crowdfunding website but also the organization.[72] Moreover, identifying the correct category matters, too, since different requirements apply to different categories.

Conclusion: crowdfunding considerations for 501(c)(3) organizations

There are many important considerations for a 501(c)(3) organization that wishes to use any type of crowdfunding for these purposes. Many of these considerations are overwhelmingly practical or may be fact-dependent. However, it is important for these organizations to also consider the following

[68] California requires professional fundraisers to have contracts with every charity for which they are soliciting, which contracts must have specific terms that are designed for the protection of a charity and its funds, such as a cancellation clause, and a description of respective obligations of the fundraiser and the charity. *See* Basic Components of a Fundraising Representation Agreement, https://oag.ca.gov/sites/all/files/agweb/pdfs/charities/publications/modelcontract.pdf.

[69] See, e.g., Cal. Govt. Code section 12599.1.

[70] See, e.g., Ala. Code section 13A-9-70; Ill. Admin. Code tit. 14, section 480.90; Ohio Rev. Code section 1716.09.

[71] See, e.g., Mass. Gen. Laws ch. 68, section 24; N.Y. Exec. Law section 171-a.

[72] See Wu, "California Attorney General Issues Guidance on Charity Crowdfunding Platform Regulation," Perlman and Perlman, LLP (1/6/17), http://www.perlmanandperlman.com/california-attorney-general-issues-guidance-on-charity-crowdfunding-regulation.

sorts of issues when deciding the most appropriate crowdsourcing mechanism in light of state regulation of solicitations. Importantly, this list is not exhaustive. It is always important for an organization to work out its particular situation with experienced counsel.

1. Does the platform receive or control the funds raised itself? If yes, this fact tends to be indicative of a PCF or CCV, depending on the context. Organizations should be mindful of ensuring state-by-state compliance by these commercial fundraisers. Organizations should also consider whether this impacts the source of the funds (i.e., whether the funds are coming from the platform or the donors) and any potential issues with public support.
2. Does the platform enable the 501(c)(3) organization to run reports that include information related to the donors' residences? Most states utilize the repeated and ongoing basis or substantial basis standards, which put organizations on constructive notice sufficient to satisfy the Charleston Principles. If this information is known (or capable of being known), the organization has a better chance of ensuring compliance.
3. Consider relationships with influencers carefully. If influencers are paid (in cash or in kind), they are likely to become PCFs. If this creates a compliance hurdle, organizations should consider working with influencers who are passionate about the work of the organization and are willing to act in such capacity on a volunteer basis.
4. Understand the legal structure of the platform, but do not assume that it makes a meaningful difference with respect to these issues. For example, while there are platforms that are themselves exempt under Section 501(c)(3), those platforms are still required to fulfil these requirements. This would include, to a certain extent, Network for Good, which is a nonprofit-

owned for-profit and maintains a donor advised fund that facilitates donations.

5. How transparent is the platform for potential donors? It is vital that the platform does not make any representations or implications that the organization will receive an amount greater than the arranged-upon amounts. Organizations should be upfront and disclose amounts that will be maintained by crowdfunding websites.
6. What kind of follow up will you send? Remember, communications via e-mail or other electronic means could be the requisite connection to give rise to activity within the state sufficient to trigger registration requirements.

The earlier section of this article discussed at length the concepts of attribution. In doing so, it highlighted the common issue of political campaign intervention. However, the concept of attribution is not limited to political contexts.

Instead, it seems reasonable that a state could argue that a 501(c)(3) organization is obligated to register in a state because of solicitation activity by representatives of the organization. Moreover, with the potential grasp via social media, it is logical to assume that the social media postings by these representatives could be the basis for such a position. Therefore, 501(c)(3) organizations should consider including positions on fundraising solicitations within their social media policies. Particularly if the individual making the plea to his or her network on Facebook is an "official," a simple request for money that reaches residents of a state like New York or Florida could be sufficient to raise significant legal issues for the organization. ■