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**THE RISKS AND REWARDS OF SOCIAL MEDIA**

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# **THE RISKS AND REWARDS OF SOCIAL MEDIA**

## **I. Social Media Platforms**

Facebook- commonly thought of as the most popular of the social media platforms, many are moving away from it due to the frequent changes to the algorithm.

Instagram- a visual storytelling platform owned by Facebook, mostly used for visual content such as videos or images.

Twitter- 280 characters or less, this is the most commonly used platform to have conversations. The use of the hashtag allows you to follow and conversations around a certain subject area.

Snapchat- most commonly used by the younger generation, businesses are finding ways to meet their audiences there. Content disappears within a few seconds, except Snapchat stories which last a longer time.

WhatsApp- very popular with an international audience and users on the west coast of the US are becoming active users.

LinkedIn- most commonly used for career and job information, they recently created a thought leadership platform called Pulse that has become very popular.

## **II. Key Legal and Practical Risks**

As we have all seen in various contexts, there is a yang to social media's yin. Social media platforms can be unrivaled in advancing a mission, but the qualities that make them so effective can create mischief or mayhem. With the light touch of a screen, an organization may instantly and irrevocably deliver a message to thousands of targeted constituents or publish it for general consumption. Whether this results in nirvana or a headache (or worse) may rest on the impulse of a volunteer.

As a result, nonprofits wanting to harness these resources must also contend with how to mitigate inherent risks. Of course, this process requires identifying the risks, which can vary widely based on the nature of the organization (e.g. operating, philanthropic, or advocacy oriented), regulatory overlays (e.g. public charity vs. private foundation), and the components of the social media strategy. This section will provide an overview of the most common risks, but it should not be considered exhaustive or complete. It may provide a good starting point, but each organization needs to conduct its own tailored risk assessment.

## **A. Nonprofit/Tax Compliance**

The regulatory framework for charitable nonprofits is comprised of aspects of state law pertaining to nonprofit corporations (or trusts) and federal tax law stemming from exemption under Section 501(c)(3). While a nonprofit's activities may implicate other areas of law (e.g. health care regulatory or education law), these are the legal lodestars guiding all but a few nonprofits. That being said, the rules can vary somewhat depending on the activities of an organization and how it is funded. In any event, when it comes to social media, the most common nonprofit/tax-exemption concerns are lobbying/political activities and charitable solicitation registration requirements.

### **1. Lobbying and Political Activities**

#### **a) Overview**

501(c)(3) organizations must be aware of the limits relating to political activities and how these limits may interact with social media. This outline offers a high level summary of these limits but is not the appropriate place for a full in depth analysis.

A 501(c)(3) public charity may not engage in more than an insubstantial amount of lobbying (attempting to influence legislation), subject to specific exceptions, and as measured by one of two tests. As a result, public charities that engage in advocacy by way of social media need to examine whether their activities constitute lobbying.

Generally, lobbying is contacting or urging the public to contact legislators for the purpose of proposing, supporting, or opposing legislation. "Legislation" means any action by Congress, a state legislature, a local council or other similar governing body, as well as action by public referendum or ballot initiative. Importantly, legislation does include regulatory actions of the administrative bodies or the executive branch. Lobbying can include direct lobbying (contacts with members of the legislative body or their staff members) and grassroots lobbying (communicating with the general public to influence their opinion about a particular piece of legislation).

To determine whether it has exceeded the permitted amount of lobbying, a public charity can be subject to one of two tests: (1) the vague "no substantial part test," or (2) the expenditure test under the 501(h) lobbying election. A full treatment of these tests is beyond the scope of this outline, but suffice it to say that the applicable test could be a material consideration in choosing and assessing the risks relating to a social media strategy. For instance, the 501(h) election rules provide a very specific definition of grass-roots lobbying; communications not meeting this definition are simply not lobbying communications. Also, since the 501(h) test is based solely on expenditures, the relatively low costs of social media platforms may provide for a cost effective way to maximize expenditures within the grassroots lobbying limits.

Private foundations have a more stringent regime; subject to a few exceptions, lobbying is strictly prohibited and may result in excise tax penalties. While primarily about broadcast media, the recent Parks Foundation case is prime example of the risks for private foundations flying close to the

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