

Friends, Tweets, and Links: IRS Treatment of Social Media Activities By Section 501(c)(3) Organizations

by Allen H. Mattison



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The Internet in general, and social media in particular, have revolutionized the way tax-exempt organizations¹ and their supporters interact with each other. The Internet virtually eliminated the cost of communicating with the public, and social media have spawned new ways of viewing relationships between people and organizations (for example, Facebook “friends”) and of communicating with one another (for example, 140-character “tweets”). As nonprofit managers adapt old practices to the openness and speed of a new generation’s viral communications, tax practitioners are being asked to help clients leverage this new environment without running afoul of restrictions on exempt organizations’ political communications and lobbying activities.

However, attorneys’ efforts have been complicated by two factors. First, many tax practitioners do not count themselves among the half-billion people using Facebook or the millions on myriad other social networking sites being created — and fading into extinction — each year.²

¹Throughout this article, the term “tax-exempt organization” is used interchangeably with the term “501(c)(3) organization” to refer to public charities exempt from taxation under IRC 501(c)(3) and described in sections 509(a)(1), 509(a)(2) and 170(b)(1)(vi). References to private foundations or other section 501(c) organizations will clearly indicate the type of organization being discussed. All section citations, unless otherwise noted, are to the Internal Revenue Code.

²Facebook claimed more than 500 million users in July 2010; by January 2011, potential investors were told it had gained an additional 100 million users. Nicholas Carson, “Goldman to clients: Facebook has 600 million users,” MSNBC, Jan. 5, 2011, available at http://www.msnbc.msn.com/id/40929239/ns/technology_and_science-tech_and_gadgets. Additionally, Twitter

(Footnote continued in next column.)

This unfamiliarity inhibits practitioners’ ability to understand clients’ questions and to develop useful solutions to their challenges. Second, the IRS has been relatively silent on the salient questions facing exempt organizations trying to communicate via social media.

This article explains two of the most popular social media platforms, to give tax practitioners a basic understanding of the terminology used by their clients and others. It then examines the way the IRS may approach a variety of situations that leaders of exempt organizations commonly face as nonprofits try to maximize their social media power.

As new technologies, social media present a variety of issues, some of which are analogous to situations for which the IRS has issued guidance. Other issues are unique to social media, and the IRS has not issued relevant guidance. Practitioners should be aware of the social media issues their clients may be confronting and at least recognize the questions social media raise, even when clear answers do not exist.

I. Introduction to Social Media

During the last decade, the rise of social media³ has enabled people to interact with each other and receive news in ways never before possible. Social media facilitate communication by eliminating barriers of entry to expressing oneself on the Internet. At the turn of the century, a person needed at least rudimentary computer-programming skills to post information to the Internet; a

claims 175 million users. Claire Cain Miller “Twitter Financing Raises Its Value to \$3.7 Billion,” Bits Blog, *The New York Times*, December 15, 2010, <http://bits.blogs.nytimes.com/2010/12/15/twitter-financing-raises-its-value-to-3-7-billion>, and LinkedIn claims 90 million users, “LinkedIn: About Us,” <http://press.linkedin.com/about>. Other sites claiming more than 100 million users each include Qzone, used mainly in China; Vkontakte, used primarily by Russian-speakers; and Orkut, popular in Brazil and India. See “List of Social Networking Websites,” available at http://en.wikipedia.org/wiki/List_of_social_networking_websites.

³The term “social media” is a noun defined as “forms of electronic communication (as Web sites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (as videos).” “Definition of Social Media,” available at <http://www.merriam-webster.com/dictionary/social%20media>; see also “Social Media,” available at http://en.wikipedia.org/wiki/Social_media.

person needed either to establish his or her own website or create a text-only “web log” (a term commonly shortened to “blog”), usually through a third-party site. Since then, the development of social media tools has enabled anyone with a computer or an Internet-connected cellphone to share text, photographs, or videos instantly with the world, without the user needing any special programming skills. As the Internet has grown to an astonishing size,⁴ the rise of social media has also given users a tool for sorting the wheat from the chaff: Social media sites enable users to read material recommended to them by trusted friends or other individuals whose opinions they respect.⁵

While each social media site seeks to create an identity for itself as offering a specific benefit, all social media platforms provide users a tool for connecting with other people. Facebook, as discussed in more depth below, enables users to share with friends news of their day-to-day lives and express their opinions on topics they care about. Twitter, also discussed below, offers a way to share one’s thoughts with the world in 140-character tweets. YouTube,⁶ a video-sharing service, brands itself as a way to “broadcast yourself.” Flickr⁷ is a photo-sharing website, and LinkedIn⁸ facilitates networking among professionals. Tax-exempt organizations leverage all of these social media “channels” to communicate with supporters and the public, attract new members, solicit contributions, and marshal public opinion to pressure public officials.⁹

A. Facebook

Facebook, the world’s most popular social media site, has achieved enormous success since its 2004 founding by continually evolving as users invent new ways to take advantage of the basic platform.¹⁰ At its most elemental,

Facebook gives people a way to keep in touch with their friends. A user registers personal information with the website, which creates a profile page for that person. Users may list only their most basic information, such as their names, or they can include more details, such as contact information, names of family members, employment history, favorite music, et cetera.

After users register with Facebook, they can use the Facebook website or an application on an Internet-enabled cellphone to send messages to people they know who also are registered with Facebook. Users also can invite other people to be listed as friends; they become linked as friends only when the recipient accepts the invitation. Users may restrict information they share so that it is available only to their friends or only to their friends and their friends’ friends, or they may allow anyone to access the photographs, videos, and other information they post. Some users choose to “friend” only their closest personal friends, while others extend invitations to the most casual acquaintances.¹¹

Individuals post status updates with information from the profound (for example, announcing deaths) to the mundane (for example, announcing what they ate for breakfast). The status updates may include photographs, videos, and links to other Web pages. As with other information in their profiles, users may restrict their status updates so that they are visible only to their friends, to friends and friends of friends, or to the public.

The status updates posted by a user’s friends appear on the user’s Facebook news feed, a modern-day analog of the news tickers mounted on buildings a half-century ago. While scrolling through the updates on their news feeds, users may post comments responding to their friends’ status updates, and the responses will be visible to others with access to the status update. Alternatively, a user may simply signal his approval for the sentiment in a status update by clicking a button in the news feed that says “like.” Of course, a user need not comment on or “like” every status update; most users ignore the majority of their friends’ status updates.

A person’s profile also includes a “wall” on which the user’s friends may post comments — a virtual form of graffiti. These wall comments (for example, birthday wishes or similar sentiments) are visible to the profile owner’s other Facebook friends. In this way, the communications are more public than a direct e-mail message.¹²

⁴In July 2008, Google found that the Internet had hit a milestone of having 1 trillion unique URLs, that is, more than a trillion separate websites. The number of web “pages” housed within those trillion websites cannot be calculated, according to Google. See “We knew the web was big” available at <http://googleblog.blogspot.com/2008/07/we-knew-web-was-big.html>.

⁵See Randall Stross, “World’s Largest Social Network: The Open Web,” Digital Domains, *The New York Times*, May 15, 2010, available at <http://www.nytimes.com/2010/05/16/business/16digi.html>.

⁶www.youtube.com

⁷www.flickr.com

⁸www.linkedin.com

⁹Facilitating social networks can be charitable activity. On Aug. 25, 2010, the IRS issued a determination letter to Jumo International Inc. stating that the organization qualified for exemption as an organization described under section 501(c)(3). Jumo’s primary activity is operating a social networking platform, www.jumo.com, that enables people to connect with other 501(c)(3) organizations and with like-minded supporters of those nonprofits. *But see* IRS LTR 410144016 (Aug. 10, 2010) (denying 501(c)(3) status to a social media website that would improperly benefit its for-profit subsidiary).

¹⁰See “How Facebook Beat MySpace,” by Adam Hartung, *Forbes* blog, Jan. 14, 2011, available at <http://blogs.forbes.com/adamhartung/2011/01/14/why-facebook-beat-myspace/>.

¹¹Facebook limits individual users to 5,000 “friends,” but as is discussed below, an organization, celebrity, or other thing may amass an unlimited number of “fans.” See “Are 5,001 Facebook Fans One Too Many,” by Aimee Lee Ball, *The New York Times*, May 28, 2010, available at <http://www.nytimes.com/2010/05/30/fashion/30FACEBOOK.html>. British social scientist Robin Dunbar has hypothesized that the human brain can maintain stable relationships, i.e., true friendships, with only 150 people at once. *Id.*

¹²Facebook also provides users with the means to send messages directly to one another, without the content being visible to others outside that conversation. These direct messages are similar to traditional e-mail messages.

Organizations, including exempt entities, also may create their own profile pages.¹³ Facebook's corporate headquarters includes a team of investigators assigned to verify that pages were created by the person or organization whom the page claims to represent; pages created by imposters are removed by Facebook.¹⁴ On its profile page, an organization may post a link to its Internet home page, information about its mission and history, photographs, reports, and applications created by the organization.¹⁵ The organization may post status updates in which it links to media reports relevant to its mission, alerts people to upcoming events, urges them to contact members of Congress regarding an upcoming vote, shares photographs, and other purposes.

People do not "friend" an organization in the same manner that they would link themselves to another individual in mutual friendship. Rather, a user indicates support for an organization by clicking a button that says "like" on the organization's Facebook page. The organization also may embed "like" buttons on its Internet home page and other Web pages it maintains, to make it easier for visitors to connect with the organization. If a person "likes" a nonprofit, the organization is listed on the individual's profile page so that others can see that individual's affinity for the cause. An individual's news feed will include status updates of all entities they "like," enabling the individual to keep abreast of their favorite organizations' activities. Users also may share an organization's status updates with their friends, demonstrating the user's commitment to the organization's cause and helping the organization reach a new group of potential supporters.

Facebook posts offer organizations several benefits that traditional e-mail does not. First, the etiquette that has developed around Facebook and traditional e-mail is such that it is appropriate for an organization to post numerous status updates per day on Facebook, while sending such a high volume of e-mail would be considered spam. (With each technology, increasing the volume of communications does not generate additional costs, other than the staff time necessary to write more status updates or e-mails.) Second, Facebook provides organizations with direct access to its followers. As Facebook approaches its goal of displacing Google as people's primary gateway to the Internet,¹⁶ organizations

know Facebook is a place where they can find their target audience. People change their e-mail addresses and set spam filters to eliminate junk mail, but organizations can catch a follower's attention with a provocative status update if the user checks his Facebook news feed.

Most important, though, communicating on Facebook connects an organizations' followers, generating a sense of community that e-mail does not. When a person "likes" an organization, the person learns how many people like the organization, sees photographs of some of those people, and, crucially, learns which of the person's own friends also like the organization. This strengthens the user's personal connection to the organization in a way that cannot be achieved through e-mail or a traditional Internet site.

Further, when the organization posts status updates, its followers can read comments posted by other followers, and see how many people have chosen to signal their approval by "liking" the update. Status updates also can inspire users to share their personal stories on the subject, provoke humorous responses, or generate debates among followers. The personal stories posted by followers of an organization can strengthen a reader's connection to the organization, even if the reader does not post a comment related to the organization's status update. Mass e-mails, an inherently one-way communication, cannot match Facebook for building organizational loyalty or facilitating community organizing.

B. Twitter

Twitter is a tool for microblogging. Blogs changed communication by giving people the power to publish their writings without the obstacle of needing a printing press; suddenly, anyone could write a short rant or a long, carefully reasoned opinion article and share it with the world. Blogs sent street-corner soapboxes the way of the buggy-whip.

Microblogging is blogging in miniature. With Twitter, people express themselves in 140-character¹⁷ bursts. Generally, Twitterers allow their messages to be read by anyone with an Internet connection, although the service does enable users to restrict their messages to a list of approved users. Each Twitter user has a short nickname, which is preceded by the "@" symbol (for example, "@whitehouse" is a news feed published by the Obama

¹³Similarly, celebrities and companies create their own promotional pages. See "Ashton Kutcher" available at <http://www.facebook.com/#!/Ashton> and "Coca-Cola" available at <http://www.facebook.com/#!/cocacola>.

¹⁴See "Facebook Tips: What's the Difference between a Facebook Page and Group?" by Nick Pineda, The Facebook Blog, Feb. 24, 2010, available at <http://blog.facebook.com/blog.php?post=324706977130>.

¹⁵See, e.g., the Sierra Club's Facebook page, <http://www.facebook.com/SierraClub> (providing visitors with photographs of winter recreation in Yosemite National Park, videos on global warming, and applications that inform users whether they or their friends live near toxic coal-ash dumps).

¹⁶In 2010, Facebook.com overtook Google.com as the most often-visited website in the United States. Reuters, "Facebook tops Google as most visited site in U.S.," Dec. 30, 2010,

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available at <http://www.reuters.com/article/2010/12/30/facebook-google-idUSN3011260620101230>. When all websites owned by the companies are included (e.g., YouTube.com is owned by Google), total visits to Google properties surpassed visits to Facebook properties. *Id.* As more people use Facebook, however, the site will become an increasingly important tool for organizations trying to communicate with the public.

¹⁷Twitter initially was developed to work with phone-to-phone text messaging ("Short Message Service" or "SMS"), which has a limit of 160 characters. Working with this constraint, Twitter's developers set a 140-character limit to tweets to accommodate a user name of up to 20 characters, in addition to the content of the tweet. See "Twitter creator Jack Dorsey illuminates the site's founding document. Part I," Technology Blog, *Los Angeles Times*, Feb. 18, 2009 available at <http://latimesblogs.latimes.com/technology/2009/02/twitter-creator.html>.

administration, and “@IRStaxpros” is a news feed published by the IRS for tax professionals).

To read tweets, a person may log onto the Twitter website or use Twitter’s smart-phone application. Although anyone may read tweets, users must first register with Twitter to post their own messages and to follow specific users. By following someone else, the tweets posted by the person or organization that the user is following will be sent to the user, appearing sequentially in a stream of tweets on the user’s computer screen or smart phone. This stream of tweets is similar to the Facebook news feed in form and function; each is a version of the Times Square news ticker.

Despite the extensive regulation of — and guidance related to — section 501(c) organizations, the IRS has said relatively little regarding online communications by exempt organizations.

People and organizations use Twitter to keep each other updated on current events in their lives and in the world at large. Exempt organizations may use it to alert supporters of an upcoming event, share news about the issues they focus on, or urge followers to contact their senators before a legislative vote. Nonprofits also can use Twitter across media platforms, such as to provide a link to a new video the organization has posted to YouTube or a link to a newspaper article mentioning the organization.

Tweets spark give-and-take among users, and organizations can reap the same community-organizing benefits as those generated by Facebook status updates. Users can respond to each other’s tweets, and the resulting conversation is visible to the public. Further, users may “retweet” a message, disseminating it to the list of people who are following them.

II. Application of IRS Guidance to Social Media

Despite the extensive regulation of — and guidance related to — section 501(c) organizations, the IRS has said relatively little regarding online communications by exempt organizations.¹⁸ Recognizing the uncertainty nonprofits face, in 2000 the IRS asked for public comment on more than two dozen questions related to online activities by exempt organizations.¹⁹ Organizations responded with thousands of pages of comments, but the agency never answered the questions it posed. Since 2000, the IRS has mentioned a handful of Internet-related issues in statements carrying varying amounts of prece-

¹⁸For an examination of possible IRS treatment of various Internet activities in the days before the rise of social media, see “Tax-Exempt Organizations and the Internet: Tax and Other Legal Issues,” Catherine E. Livingston, 31 *Exempt Org. Tax Rev.* 419 (Mar. 2001).

¹⁹See IRS Announcement 2000-84, 2000-2 C.B. 385.

dential weight,²⁰ but it has not produced comprehensive guidance regarding social media.

In the statements published by the IRS, perhaps the most basic principle is: “A website is a form of communication.”²¹ Obvious as it seems, this common-sense sentence is important because it confirms the IRS will treat online activities according to the same principles that guide treatment of an organization’s other communications. In the absence of more specific guidance related to social media, exempt organizations have little choice but to extend existing principles of exempt-organization law to their online activities and apply a risk analysis where the social media issues are *sui generis*.

A. Indirect Website Endorsements of Candidates

A 501(c)(3) organization that uses its website to support or oppose political candidates likely will be found to have violated the terms of its tax-exempt status.²² This includes not only direct endorsements of candidates, but potentially even very indirect indications that a candidate’s positions are aligned with an organization’s views. The IRS has indicated it will examine the context of an organization’s website as a whole, rather than consider whether the content on a particular Web page constitutes political intervention on its own. According to an IRS memorandum issued in 2008, a 501(c)(3) organization may have engaged in political activity if it takes a position on an issue on one section of its website, and, on a separate part of the website, provides neutral, unbiased information regarding candidates’ positions on that issue.²³ According to the memorandum, a nonprofit may be found to have engaged in political activity even if one element is on the website and the other is published separately.²⁴

That position seems to contradict a revenue ruling that said a 501(c)(3) organization may publish voter guides

²⁰See, e.g., Rev. Rul. 2007-41, 2007-25 IRB 1421 (addressing website links); IRS TAM 200908050 (addressing a website shared by a 501(c)(3) organization and a related section 501(c)(4) organization), available at <http://www.irs.gov/pub/irs-wd/0908050.pdf>; Election Year Issues, Judith E. Kindell and John Francis Reilly, 2002 EO CPE Text (hereinafter “2002 EO CPE Text”), at 382 (mentioning that endorsing a candidate on a website constitutes political intervention), available at <http://www.irs.gov/pub/irs-tege/eotopic02.pdf>; Memorandum from Lois G. Lerner, director, IRS Exempt Organizations Division, Apr. 17, 2008 (hereinafter “Lerner memorandum”) (addressing website links and publication of candidate information), available at http://www.irs.gov/pub/irs-tege/2008_paci_program_letter.pdf.

²¹Rev. Rul. 2007-41.

²²Section 501(c)(3); see also Rev. Rul. 2007-41 at 10 (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.”)

²³Lerner memorandum, *supra* note 20.

²⁴*Id.* (“[T]here are situations where a 501(c)(3) organization itself (1) takes a position on an issue, and (2) provides information about candidate positions on the same issue, placing the organization at risk of having intervened in a political campaign. The risk arises, and the case should be pursued, even if

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that reprint candidates' responses to a questionnaire covering a variety of issues as long as neither the questionnaires nor the guides indicate the organization's preferred position on the issues.²⁵ As organizations balance the likelihood of an IRS enforcement action against their interests in transparency (in other words, publishing their voter guides where anyone can read them) and wide dissemination of voter education materials, they should recognize the 2008 memorandum does not carry precedential weight, and it remains to be seen how rigorously the IRS will pursue its position.

A 501(c)(3) organization may be found to have engaged in political intervention even if the candidate-related content on its website is paid for by another organization. In 2009, the IRS found a 501(c)(3) organization had engaged in prohibited political activity when its website hosted pages paid for by its related 501(c)(4) organization.²⁶ In that case, the Web pages containing political content bore the 501(c)(4) entity's logo and were paid for by the 501(c)(4) entity under a cost-sharing agreement. To the IRS, those points were not enough to overcome the fact that the pages also included the logo of the 501(c)(3) organization and were nested within the 501(c)(3) organization's website.

The IRS may find political intervention when a nonprofit links to a non-candidate website that supports or opposes a candidate.

Links to other websites may be considered an indirect endorsement by the organization that posts the links. At its most basic, a link is a recommendation that website users should visit the linked site. As discussed below, a link to a candidate's website may be considered political intervention on behalf of that candidate. Further, the IRS may find political intervention when a nonprofit links to a non-candidate website that supports or opposes a candidate.²⁷ Special treatment, however, may be given to links between a 501(c)(3) organization and the separate website of its related 501(c)(4) entity. Before the 2008 election, an IRS memorandum said that "at this time" it would not pursue enforcement cases involving a link between the website of a 501(c)(3) organization website "and the home page of a website operated by a related section 501(c)(4) organization."²⁸ (Emphasis added.) This exception is important for 501(c)(3) organizations, because they often want to link to their affiliated 501(c)(4) entity. The exception applies only to links to the 501(c)(4) home page, however, and does not cover, for example,

links from a 501(c)(3) organization website to the endorsements page of a 501(c)(4) entity's website.

However, the IRS guidance does not address an important question that often arises before elections: Would this safe harbor apply if the 501(c)(4) entity posted its candidate endorsements on its home page? Also, it is unclear whether this exception applied only to the 2008 election cycle or whether it will remain in effect for future elections.

B. Interaction With Candidates

Section 501(c)(3) organizations must approach interactions with political candidates cautiously. Interactions between a 501(c)(3) organization and a candidate involve a high risk that the IRS will find the nonprofit has intervened in a political campaign, violating the terms of its exempt status.

Practitioners may deduce potential IRS treatment of online activities by extending guidance issued in other situations. Under some carefully circumscribed conditions, a candidate may speak at a charity's event or participate in a debate hosted by the organization.²⁹ Doing so is permissible only if the organization provides equal opportunities to all candidates for that office and makes clear that it does not support any candidate. In addition, a candidate who is also an officeholder may conduct activities with a 501(c)(3) organization when appropriate as part of the official's government role.³⁰ Further, a candidate may appear without an invitation at an organization event open to the public without risking the organization's tax-exempt status.³¹ These principles are useful in examining many of the questions that arise most frequently for exempt organizations using social media.

i. Links to Candidates' Websites

In general, a link from a 501(c)(3) organization's website directly to a candidate's website will be deemed to be political intervention. A link from a nonprofit's Web page to a candidate's website is considered to be support for the candidate. The IRS has carved out an exception to this rule, though: A 501(c)(3) organization may link directly to a candidate's website without engaging in political intervention if the facts and circumstances demonstrate that the link serves an exempt purpose and nothing about the link's context indicates support of or opposition to a candidate.³²

Links to candidates' websites must be presented in a neutral, unbiased manner, with all candidates for a particular office included.³³ For example, a 501(c)(3) organization may post an unbiased, nonpartisan voter guide³⁴ that includes a link to each candidate's website, with text saying, "For more information on Candidate X,

the two elements are in separate parts of the organization's Web site, or if one element is on the Web site and the other is not." (emphasis added).

²⁵See Rev. Rul. 78-248; see also Rev. Rul. 80-282.

²⁶IRS TAM 200908050, available at <http://www.irs.gov/pub/irs-wd/0908050.pdf>.

²⁷See Rev. Rul. 2007-41 at 11-12.

²⁸Lerner memorandum, *supra* note 20 (emphasis added).

²⁹See Rev. Rul. 2007-41 at 5-6; Rev. Rul. 86-95; Rev. Rul. 74-574.

³⁰See Rev. Rul. 2007-41 at 6-8.

³¹*Id.* at 5.

³²*Id.* at 11-12.

³³See *id.* at situation 19.

³⁴See Rev. Rul. 78-248.

click here.”³⁵ Similarly, a 501(c)(3) organization may post a list of all candidates for a particular office, with links to each candidate’s campaign website presented in alphabetical order, as long as the context does not indicate support or opposition to any candidate.

It seems likely the IRS would argue an organization had engaged in political intervention if the organization ‘liked’ or ‘friended’ a candidate.

In its guidance, the IRS did not address links from an organization’s Web page to a politician’s official government page. Section 501(c)(3) organizations may lobby and otherwise engage with leaders in official capacities. Unless there was context indicating a connection to an election campaign, links from an organization’s Web page to an official government website likely would not be found to constitute political intervention. When the official is also a candidate, an organization, to emphasize the link’s nonpolitical nature, may want to include a statement that the link exists only because of the individual’s role as a legislator or other government position. As with other analyses, though, the IRS will consider the facts and circumstances surrounding the link.

Links to a 501(c)(3) organization’s website from a candidate’s page should not be treated as political intervention by the IRS; an organization has no control over the links connected to its page. Absent other circumstances indicating collaboration between a candidate and an organization, a 501(c)(3) organization does not need to take any action if it learns that a candidate has established a link to the organization’s Web page. For example, a candidate touting his education credentials might link from his campaign page to the page of the local PTA, of which he was president. The link alone will not jeopardize the PTA’s status under section 501(c)(3). However, a link from the PTA website to the candidate’s page may constitute political intervention.³⁶

ii. Facebook and Candidates — Friending and Liking

The IRS has not provided guidance on whether it would be political intervention for an organization to “friend” or “like” a candidate on Facebook. However, based on principles articulated in other contexts, it seems likely the IRS would argue an organization had engaged in political intervention if the organization “liked” or “friended” a candidate. The IRS probably would take the position that liking or friending a candidate indicates support for the candidate and thus constitutes political intervention. The terms used by Facebook — “friend” and “like” — indicate support for the candidate with whom the organization would be associating.

Even if the organization were to friend or like every candidate for a particular office, the facts and circum-

stances might not indicate that the candidates were all being treated equally. On a Facebook user’s profile page, only a few of the user’s “likes” or “friends” appear on the main page; the rest are visible only when a visitor clicks “see all.” Even if a charity “liked” all candidates in a race, some might get prominent placement on the organization’s profile page while others would be more difficult for visitors to find. For these reasons, a 501(c)(3) organization faces legal risk if it “likes” or “friends” candidates.

Liking or friending a candidate’s official government page carries some risk that the IRS might view it as political intervention. Unlike links from its own website to candidates’ Web pages,³⁷ an organization cannot control the context in which its link to an official government Facebook page appears. Instead, it is likely the organization’s page will simply show visitors that the nonprofit likes “Governor Smith” or is friends with “Senator Jones.” Without context to explain more about the link, such as the fact that it is the politician’s official government page that the organization likes, the IRS might view such a connection to be an indication that the nonprofit supports that person’s reelection.

Just as a 501(c)(3) organization should not need to worry about candidates who link to its Web page, an organization’s tax-exempt status should not be threatened if a candidate “likes” the organization. An organization has no control over who “likes” it, unless the organization bans a particular Facebook user from being a fan of the organization. It would be difficult for the IRS to argue a 501(c)(3) organization has engaged in political intervention simply because a candidate “liked” the organization on Facebook.³⁸ The analysis probably would be different, however, if the organization banned particular candidates from liking it while allowing other candidates to be fans of the organization.

iii. Facebook and Candidates — Status Updates and Wall Posts

Due to the prohibition on political intervention, 501(c)(3) organizations should exercise caution when posting Facebook status updates that refer to a candidate,

³⁷See Rev. Rul. 2007-41 at 11-12.

³⁸Friending, however, may be treated differently. Most organizations by now have converted their Facebook presence to be a fan page, where other Facebook users can indicate they “like” the organization, but they cannot be “friends” with the organization. This enables an organization to avoid the 5,000-friend limit imposed on individuals’ profiles. If, however, the organization’s Facebook settings still allow it to connect with others as a friend, the act of accepting a friend invitation from a candidate may be viewed as an affirmative action indicating that the organization supports the candidate. For that reason, the IRS may consider it political intervention if an organization accepted a friend request from a candidate. Similarly, if a nonprofit’s executive director or other staff maintains a work Facebook page on organization time and using the organization’s resources, they may decide to adopt a policy of not accepting candidates’ invitations to be friends. Accepting a candidate’s friend request on a Facebook page maintained with organization funds may be viewed as support of the candidate by the organization.

³⁵Rev. Rul. 2007-41, situation 19.

³⁶See Rev. Rul. 2007-41.

when posting comments on a candidate's Facebook wall, or when posting responses to a candidate's own status update. If the organization treats all candidates in a neutral, unbiased manner, it may be able to use Facebook — without intervening in a campaign — to publicize a candidate appearance,³⁹ a forum or debate,⁴⁰ or a non-partisan voter guide.⁴¹ Whether a Facebook statement by a 501(c)(3) organization is permissible or constitutes political intervention depends on all the facts and circumstances, including whether the statement shows any bias or preference for or against a particular candidate.⁴²

Situations arise when a candidate posts a comment in response to an organization's status update, a candidate comments on the organization's wall, or a non-candidate posts political content on the organization's wall or in response to a status update. Candidates might do this from their campaign accounts or from their official government accounts. No IRS guidance addresses how a 501(c)(3) organization should respond in these cases, nor whether it matters if candidates use their official Facebook accounts rather than their campaign accounts.

If the organization does nothing in response to posts by candidates (or political content from non-candidates) on its wall or connected to its status updates, it risks the IRS taking the position that the postings are political intervention by the organization. Depending on their aversion to risk, some organizations may decide to delete every wall posting or comment from a candidate or posting or comment that contains political content. Alternatively, they could post follow-ups after every political comment stating that the sentiments expressed by others do not necessarily reflect the organization's views. Or they might place a general disclaimer on their Facebook walls or information pages stating that they do not endorse candidates or otherwise intervene in political campaigns and asking people not to post comments about candidates.

Other 501(c)(3) organizations may decide those policies are too conservative. In the absence of IRS guidance to the contrary, less conservative organizations may decide no action is necessary when candidates or others post political content on their walls or in response to status updates. Other organizations may argue that no political intervention occurs when a legislator uses his or her official government account to post a comment or when a legislator uses his or her campaign account to post an issue-oriented comment that does not ask people to support the legislator.

Whatever approach an organization adopts, the organization should apply it consistently, regardless of a message's content. Treating messages differently based on their political content risks a finding by the IRS of political intervention. For example, an organization should not delete comments that conflict with its mission while simply posting a disclaimer after other messages.

³⁹See Rev. Rul. 2007-41 at 5-6.

⁴⁰See Rev. Rul. 86-95.

⁴¹See Rev. Rul. 80-282.

⁴²Reg. section 1.501(c)(3)-1(c)(3)(iii); Rev. Rul. 2007-41.

iv. Twitter and Candidates

Regarding political campaign intervention, the same general principles apply to Twitter as apply to Facebook (and all other communication channels): A 501(c)(3) organization's Twitter feed may not contain political content evidencing bias for or against any candidate. At its most basic, this rule is easy to follow. An organization may not post tweets telling people to vote for or against a candidate or otherwise show it supports or opposes a candidate.

An organization also should not retweet candidates' tweets. For example, retweeting a candidate's announcement that she is running for office or retweeting a message about an upcoming rally likely will be viewed by the IRS as support for that candidate. Similarly, tweeting about or posting a link to a newspaper's endorsement of a candidate might be viewed as the organization's recommendation to its followers that they should read (and, presumably, be influenced by) the newspaper's endorsement.

Retweeting a candidate's announcement that she is running for office or retweeting a message about an upcoming rally likely will be viewed by the IRS as support for that candidate.

Beyond a prohibition on tweets containing explicit political content, 501(c)(3) organizations must confront more complicated questions regarding whom to follow on Twitter. Following a candidate allows the organization to track the candidate's tweets. By itself, following another Twitter user should not be considered political intervention. But if an organization follows a candidate, anyone visiting the organization's page on Twitter may see the candidate's picture on the list of accounts the organization is following. The IRS could perceive following a candidate to be an indication to the public that the organization supports that candidate.⁴³ On the other hand, an organization might choose to follow all candidates in a particular race, arguing that it has dealt with all candidates in a neutral manner and therefore has not intervened in an election.⁴⁴ The IRS might counter, however, by saying that following all candidates does not amount to neutral treatment because it will not be readily

⁴³However, merely following another Twitter user does not necessarily indicate that a user views the other positively. One may follow a user simply to keep abreast of the issues that person believes are important. Additionally, Twitter etiquette initially demanded that a Twitter user follow everyone who is following him or her, although this practice fell out of favor as Twitter grew. See Christopher Null, "Twitter Etiquette: How to Tweet Politely," PCWorld.com, posted July 28, 2009, available at http://www.pcworld.com/article/169137/twitter_etiquette_how_to_tweet_politely.html.

⁴⁴See Rev. Rul. 2007-41 at 11-12 (regarding neutral links to candidates' websites).

apparent to people visiting the organization's Twitter site that the organization has chosen to follow all candidates.⁴⁵

An organization's exempt status should not be jeopardized if a candidate or other Twitter user posts a tweet mentioning the organization in a political context. Further, if a candidate or Twitter user attaches the organization to a hashtag,⁴⁶ the organization should not be viewed as having intervened in a campaign. The organization has no control over the tweets and hashtags of candidates and other Twitter users, so the IRS should not find that those tweets amount to political intervention by the organization.

If a candidate or other Twitter user posts a tweet with incorrect information about a 501(c)(3) organization (for example, falsely claiming the organization has endorsed a candidate), the organization may need to take steps to correct the record. The organization should, however, have a policy under which it responds in a consistent fashion regardless of which candidate has posted a tweet mentioning the organization.

C. Blogging

The versatility and unique nature of blogs present a number of legal problems for 501(c)(3) organizations. Blogs⁴⁷ offer such organizations a fast and simple way to share their positions on issues, spread news, and react to events, providing more policy detail and analysis than is possible in a Facebook post or a 140-character tweet. With guest posts and comment sections, they give organizations the opportunity to share their virtual soapboxes with respected allies and unknown outsiders. Blogging can cost little money, and the reach is worldwide.

However, scrutinizing the legal compliance of every post and comment on a large and active blog may consume an enormous amount of staff resources, so 501(c)(3) organizations need to establish clear guidelines for staff to follow.

The IRS has not said whether a 501(c)(3) organization will be held responsible for every statement on its blog. Fundamentally, the issue is whether the IRS will treat a blog as a communication by the organization, or whether

it will view the blog as an open forum the organization is providing to the public. In different circumstances, the IRS has said the resources of 501(c)(3) organizations may be used for activities in which participants voice support for or opposition to candidates for public office, but only if it is clear that the organization merely was "providing a public forum for the exchange of ideas and the debate of public issues"⁴⁸ and that the organization itself was not intervening on behalf of or in opposition to any candidate. The IRS said a public television station did not violate its 501(c)(3) status when it gave candidates airtime to "present their viewpoints and urge their election to public office," as long as the station made it clear that the views expressed were those of the candidate and that the station did not endorse candidates.⁴⁹ The public television station was fulfilling its exempt educational mission by providing a forum for the exchange of political ideas. Similarly, a university did not violate the ban on political intervention when its student newspaper published endorsements supporting or opposing political candidates;⁵⁰ supporting the student newspaper furthered the university's educational mission.

One way for blogs to comply with the political activity prohibition is to divide use of a blog into situations in which the blog is a vehicle for an exempt organization to express its own views and situations in which the organization is providing the blog as a forum where the public can exchange ideas. When the organization speaks through its blog, the IRS likely would view a post supporting a candidate as political intervention. But when the blog is merely a public forum provided by the organization, a political comment might not be considered political intervention. To determine which way the IRS might view a blog statement, it helps to consider who posted the political material:

i. Staff postings. When written by an organization's paid staff, postings carry the organization's imprimatur. As such, the IRS likely will attribute them to the organization. That may be the case even if a staff member writes the posting on his or her own time, without using organizational resources.⁵¹ Therefore, postings by staff on a 501(c)(3) organization's blog should not support or oppose candidates or in any way violate the prohibition on campaign intervention.

ii. Guest postings. How the IRS would treat posts written by guest bloggers (in other words, individuals who are not employees or organization

⁴⁵Only 11 of the accounts being followed by a user are visible to people visiting the user's Twitter page. The 11 accounts that appear on the user's page rotate each time the page is refreshed, and the user has no control over which 11 accounts appear at any given time.

⁴⁶A hashtag is a pound sign ("#") added in front of a keyword in a tweet. Adding a hashtag makes the word following the hashtag a searchable topic on Twitter. The hashtag and keyword may be used either in context within the tweet (e.g., "I am paying my taxes right now to the #IRS. Due Apr. 15, so don't forget to file!") or appended at the end of the tweet (e.g., "I am paying my taxes right now. Due Apr. 15, so don't forget to file! #IRS"). A person searching "#IRS" within Twitter would find all recent tweets tagged as involving the IRS. See "What are Hashtags ("#" Symbols)?" available at <http://support.twitter.com/entries/49309-what-are-hashtags-symbols>.

⁴⁷The term is short for "web log." See Definition of Blog at <http://www.merriam-webster.com/dictionary/blog>; see also "Blog" available at <http://en.wikipedia.org/wiki/Blog>.

⁴⁸Rev. Rul. 74-574 ("Equal opportunities are afforded all such candidates for the same public office to present their views. Before and after each broadcast, a statement is made by the station that the views expressed are those of the candidate and not those of the station; that the station endorses no candidate or viewpoint; that the presentation is made as a public service in the interest of informing the electorate; and that equal opportunities will be presented to all bona fide legally qualified candidates for the same public office to present their views.").

⁴⁹*Id.*

⁵⁰Rev. Rul. 72-513.

⁵¹See Rev. Rul. 2007-41, situation 4.

officials) depends on the circumstances. If an organization invites guest bloggers only from one side of an issue or a single political perspective, the IRS is likely to see the guest bloggers speaking as a proxy for the organization. The IRS probably would take the position that the organization has engaged in political intervention if a guest blogger posts statements supporting or opposing a candidate.⁵²

However, under rulings that permit 501(c)(3) organizations to host candidate debates and appearances,⁵³ an organization may be able to use its blog as a forum for a candidate debate, and candidates and their surrogates may be allowed to write guest postings on a 501(c)(3) blog without the organization being found to have engaged in political intervention if the organization follows several precautions. First, the organization would need to invite all legally qualified candidates for a given office.⁵⁴ Second, the organization's website should bear a prominent disclaimer stating that the views expressed are those of the guest bloggers and not necessarily those of the organization, that the organization does not endorse any political candidates, and that the commentaries are presented as a public service in the interest of informing the public.⁵⁵ Third, the blog postings should be presented in a neutral manner, and the questions and format should not favor one candidate over the other.⁵⁶ Fourth, the blog posts should address a broad range of issues rather than a single issue; otherwise, the IRS might assert the posts impermissibly show a bias for one of the candidates.⁵⁷

iii. User Comments. Comments by the public posted on an organization's blog might not be attributed to an organization if the organization allows comments to be posted regardless of political viewpoint. A blog that allows anyone to post comments is akin to a public television station providing free airtime to anyone who desires it (whether or not qualified as a candidate). To bolster the argument that statements made on an open comment forum should not be attributed to the organization, the blog should include a prominent disclaimer stating that the views expressed are those of the commentators and not necessarily those of the organization, that the organization does not endorse any candidates, and that the commentaries are presented as a public service in the interest of informing the public.⁵⁸ A more

conservative route would be to delete all comments that refer to a candidate or political party. If an organization deletes only some comments based on their political content and not all comments with political content, it opens itself to an accusation that it is promoting one political message over another. Also, comments containing offensive language may be deleted by the organization if the organization does so uniformly and without regard to political content.

D. Employees' Personal and Organizational Pages

Many 501(c)(3) organizations strongly encourage, if not require, their employees to use their personal social media pages to promote organizational activities. Also, many 501(c)(3) organizations pay their communications staff to maintain Facebook pages and Twitter feeds on behalf of the organization's senior executives. These practices are consistent with the social media ethos of inclusivity, personal connections, and sharing all that happens in one's life. In many instances, however, blurring lines between one's personal and work lives conflicts with the tax laws governing exempt organizations.

For example, a 501(c)(3) organization may not allow its employees to use the organization's property to conduct political activity.⁵⁹ To the extent an organization is paying a person to post work-related information on Facebook or Twitter (whether to the individual's personal accounts or to an organizational account), it is likely the IRS would attribute the activity to the organization and would require that the activity comply with the terms of the organization's exempt status. Even when employees are posting to their personal accounts, if they are identifying themselves as employees (for example, "Come to the rally I'm organizing at the State House on Tuesday"), the online activity should comply with the terms of the organization's exempt status.

Problems may arise when employees' use of social media platforms blends their work and personal lives.

Problems may arise when employees' use of social media platforms blends their work and personal lives.⁶⁰ When a 501(c)(3) organization requires employees to use their personal social networking profiles for work-related activity, it may become difficult to distinguish job-related posts from personal posts. Until the IRS publishes guidance addressing this situation, organizations may want to consider adopting prophylactic policies to avoid having the IRS attribute to the organization the political content posted on an employee's personal Facebook profile.

In addition to encouraging employees to use Facebook, Twitter, and other social media to promote their

⁵²Rev. Rul. 2007-41 at 11 ("If an organization posts something on its web site 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.")

⁵³See Rev. Rul. 2007-41, Rev. Rul. 74-574, Rev. Rul. 86-95.

⁵⁴See *id.*

⁵⁵See Rev. Rul. 74-574.

⁵⁶See Rev. Rul. 2007-41, Rev. Rul. 74-574.

⁵⁷See Rev. Rul. 2007-41, Rev. Rul. 86-95.

⁵⁸Cf. Rev. Rul. 74-574.

⁵⁹See sections 501(c)(3), 4955(d).

⁶⁰This blending is a goal of communications strategists at many nonprofits, but it creates tension with the separation required for IRS compliance.

organizations, many 501(c)(3) organizations pay staff to create and maintain social media accounts for less technology-savvy organization executives. When employees of a 501(c)(3) organization maintain Facebook or Twitter accounts for the organization's executives, the IRS likely will treat the posts as organizational activities, subject to the restrictions imposed by the code and regulations. Postings on these accounts should not take positions in elections, just as the executive's speech or op-ed column should not. Even if executives occasionally post content themselves, such postings should not contain political material; a disclaimer stating that the political content is the personal view of the executive would not prevent the IRS from concluding that all content on the organization-maintained page is subject to the restrictions of section 501(c)(3).⁶¹ Executives may be able to use their organization-maintained Facebook page to "friend" or "like" the official government page of a public official, but should not connect to a candidate site. If executives maintain their own pages, the rules for staff posting, discussed above, would apply.

E. Lobbying

Social media provide 501(c)(3) organizations with many inexpensive opportunities to influence legislation. As long as lobbying is not a substantial part of its activity,⁶² a 501(c)(3) organization may leverage the low cost of e-mails, Web postings, and social media outreach to maximize its lobbying influence. Organizations electing to measure their lobbying activities under the section 501(h) expenditure test are subject to limits on the amounts they may spend on direct lobbying communications to legislators and some other government officials and stricter limits on grass-roots lobbying aimed at the public.⁶³ For organizations making the section 501(h) election, two issues in particular arise related to social media for purposes of the direct lobbying and grass-roots lobbying rules: whether to treat various online activities as direct or indirect lobbying, and who qualifies as a member of the organization. By thinking strategically about their social media communications, 501(c)(3) organizations can maximize their influence over legislation and public policy while conserving their limited lobbying dollars.

i. Direct Versus Grass-Roots Lobbying in Social Media

Given their hybrid nature, social media communications straddle the line between direct and grass-roots lobbying. By posting a comment on a legislator's Face-

book wall or directing a tweet at a legislator, an organization is simultaneously initiating a direct conversation with the legislator and broadcasting the communication publicly. Unlike traditional "old media" communications, which generally fit neatly into one category or another, many social media communications fit the definitions of both direct lobbying⁶⁴ and grass-roots lobbying.⁶⁵

Posting a comment on a legislator's Facebook wall or directing a tweet at a legislator may be viewed by the IRS as direct lobbying, if it contains the requisite elements, because it is a communication sent directly to the legislator for the legislator (or the legislator's staff) to read. For example, if an organization wrote a post on a senator's wall that read "Sen. Doe, get off the fence and take a stand: Support your constituents by voting to pass S.B. 321 to make streets safer," the cost may be direct lobbying because it is a communication sent directly to Sen. Doe on a communication vehicle managed by the senator's staff, and the communication refers to specific legislation and takes a position on that legislation. The same argument would also apply to a tweet directed at a legislator.

These social media communications also have a public aspect to them because they can be seen by anyone using Facebook or Twitter. The hypothetical post on Sen. Doe's wall might be viewed by the IRS as grass-roots lobbying, given the public nature of the communication, combined with the fact that it refers to specific legislation, reflects a view on that legislation, and encourages the recipient to take action,⁶⁶ thus satisfying the criteria for grass-roots lobbying communications.

The dual public-private nature of social media communications, and the IRS's silence on the issue, leaves section 501(c)(3) organizations with little guidance regarding whether to treat these messages as grass-roots or direct lobbying expenditures. The distinction is an important one, because the code imposes a tax on section 501(h) electing organizations that spend more than a certain amount on lobbying,⁶⁷ and the amount an organization may spend on grass-roots lobbying without incurring the tax is only 25 percent of the total amount it may spend on lobbying expenditures.⁶⁸ Because the code imposes a more restrictive limit on grass-roots lobbying expenditures by 501(c)(3) organizations than it imposes on direct lobbying, a conservative route would be to treat as grassroots lobbying any social media communication that could be characterized as either grass-roots or direct lobbying. That way, even if the IRS takes the more restrictive position, the organization's activities will not have caused it to exceed its lobbying limits.

In the social media context, taking a more conservative route may not have as large an impact as it would in

⁶¹See Rev. Rul. 2007-41, Situation 4.

⁶²See section 501(c)(3).

⁶³See sections 501(h), 4911(c). Expenditures are for direct lobbying if they pay for a communication with a legislator or certain other government officials, refer to specific legislation, and reflect a view on that legislation. Reg. section 56.4911-2(b)(1). Grass-roots lobbying communications refer to specific legislation, reflect a view on the legislation, and encourage the recipients of the communication to act on the legislation. Reg. section 56.4911-2(b)(2).

⁶⁴See reg. section 56.4911-2(b)(1).

⁶⁵See reg. section 56.4911-2(b)(2).

⁶⁶See reg. section 56.4911-2(b)(2)(iii)(D) (defining "encouraging the recipient to take action" as including a statement that a legislator is undecided on the legislation).

⁶⁷Section 4911(a).

⁶⁸Section 4911(c)(4).

other situations, such as television advertising. The relatively inexpensive nature of social media communications means that applying a conservative analysis will not cause 501(c)(3) organizations to sacrifice a huge amount of activity under their section 4911 limits.

ii. Treatment of “Friends” or “Followers” as Members for Lobbying Purposes

For purposes of measuring an organization’s lobbying expenditures, the code treats communications to the organization’s members more leniently than it does communications to the general public.⁶⁹ Treasury regulations permit an organization to treat some communications to its members as direct lobbying activity, even though they would be grass-roots lobbying expenditures if directed to non-members.⁷⁰ Given the limits on lobbying expenditures by organizations making the section 501(h) election, the fact that some membership communications are treated as direct lobbying enables 501(c)(3) organizations to maximize the impact of their limited lobbying dollars.

Social media have changed the way 501(c)(3) organizations think about their supporters, adding terms like “friends,” “fans,” and “followers” to a lexicon that previously included only “members” and “non-members.” Many organization managers think of their social media supporters as members, and many social media users see no distinction between liking an organization on Facebook and joining it as a member.

The IRS may have grounds to disagree, however. The regulations define a member as a person who: 1) pays dues or contributes more than a nominal amount to the organization; 2) contributes more than a nominal amount of time; or 3) is one of a limited number of “honorary” or “life” members with a connection to the organization and who were chosen for a valid reason unrelated to the

dissemination of information to members.⁷¹ The IRS has not said how much volunteer activity constitutes “more than a nominal amount of time” for an organization.

Based on the IRS membership definition, merely connecting and interacting with a 501(c)(3) organization on social media probably does not create a sufficient relationship for that person to be considered a member of the organization. Thus, a nonprofit’s status updates, tweets, and other social media communications are grass-roots lobbying if they refer to specific legislation, reflect a view on that legislation, and encourage the organization’s followers to take action on the legislation. A 501(c)(3) organization that wants to limit a lobbying communication to its members, so that the communication will be treated as direct lobbying, should use e-mail, text messages, or password-protected websites rather than a publicly accessible website.

III. Conclusion

Social networking has grown and evolved at an amazing rate over the past decade, and 501(c)(3) organizations have worked to adapt their communications practices to keep pace. Because the IRS has not been able to issue guidance as quickly, 501(c)(3) organizations must extend existing principles where applicable and make educated guesses regarding risk of various social media communications. Broad and detailed guidance from the IRS would benefit the regulated community, as it will provide more information with which to conduct risk analysis of various activities. Inevitably, by the time the IRS provides guidance regarding blogs, Facebook, and Twitter, 501(c)(3) organizations will have moved on to new technologies. But whatever guidance the IRS provides regarding social media will help organizations understand how to harness the power of those new technologies in ways that comply with the restrictions placed on 501(c)(3) organizations.

⁶⁹See section 4911(d)(3).

⁷⁰Reg. section 56.4911-5.

⁷¹Reg. section 56.4911-5(f)(1).