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## **WORRIED ABOUT STATE REGULATION OF CHARITABLE SOLICITATIONS ON THE INTERNET? DO THE CHARLESTON.**

According to the National Council of Nonprofits, most states require charitable nonprofits to register with the state in which it is soliciting donations before it begins receiving donations. Usually the registration process requires nonprofits to pay a fee, and describe the fundraising and other activities that it engages in.

Historically, the definition of “solicitation” was rather obvious. Solicitation essentially meant asking people for donations, whether orally or through writing. Moreover, because of the nature of solicitations and the financial incapability to travel long distances to ask for donations, many nonprofits either registered in only their domicile state, or in a few surrounding states. However, as with many other aspects of life, the internet and the growth of e-commerce applications have proven to be great disruptive technologies in the non-profit sector, raising questions about the applicability of state regulations on out-of-state charitable organizations.

With relatively little effort a nonprofit can now create a website that reaches the entire United States and the rest of the world. But the opportunities provided for nonprofits by the internet also raise regulatory questions. Because a person anywhere in the world can now be “solicited” to donate with a click of a button, do nonprofits need to register in every state? This is not an idle concern for nonprofits. Noncompliance with a state charitable solicitation registration can result in enforcement actions that carry potential fines as well as bad publicity for the organization. With over a billion dollars in annual contributions large nonprofits such as United Way, and Salvation Army have the resources needed to register in every state. However, for many small nonprofits, this is simply not practicable.

A threshold question for nonprofits concerned with compliance is, “What constitutes a solicitation?” Certainly any intentional, targeted messaging, such as an e-mail requesting a donation would be considered a solicitation even under the pre-internet

definition of solicitation. In fact, Mississippi brought an action against an unregistered, out of state charity that sent e-mail newsletters to eight residents of Mississippi. But what about a “Donate Now” button listed on the homepage of a nonprofit’s website? For the most part this is a state-by-state question depending on how broad a state defines solicitation. For example, New York has a very broad statute, defining solicitation as “[t]o directly or indirectly make a request for a contribution, whether express or implied, through any medium.” Additionally, New York Law states that a ‘solicitation’ shall be deemed to have taken place whether or not a contribution is made.

There appears to be mixed messages coming from nonprofit consultants and commentators on this topic. One nonprofit consulting firm contends that simply displaying a donate button on an organization’s website or social media page triggers registration requirements in every state. Others suggest that it isn’t the donate button that triggers registration, but rather a follow-up solicitation after a donation has been made. Still another commentator suggests that a nonprofit must have ‘minimum contacts’ with a state such that the nonprofit should reasonably anticipate being haled into court.

In response to rising confusion about online solicitation, in 2001 the National Association of State Charities Officials (NASCO) published the “Charleston Principles” which recommend that charitable solicitations should only be regulated by a state if: (a) the organization is domiciled within the state; (b) the charity used the Internet to specifically target (via email or other methods) donors in that jurisdiction; or (c) the charity received contributions from that jurisdiction on a "repeated and ongoing basis or a substantial basis through its Web site." The first two of the Charleston Principles are clear. However, regarding the third principle, what constitutes a “repeated and ongoing basis”? Since the publication of the Charleston Principles, Colorado, Mississippi, and Tennessee have enacted laws defining donation thresholds that will trigger state regulatory jurisdiction in those states.

Courts have been relatively silent so far regarding the question of state regulation of online charitable solicitations. However, while not directly on point, the U.S. Supreme Court’s decision in *South Dakota v. Wayfair* (2018) may provide some useful guidance. Prior to *Wayfair*, Supreme Court precedent held that a business had to have a “physical presence” within a state in order to meet the Supreme Court’s requirement that a business have a “substantial nexus” with a state in order for the state to have the authority to require collection of sales tax. *Wayfair* held that a state may require

out of state sellers with no physical presence in the state to collect and remit sales tax for the goods they sell in the state. The Court did not provide any clear standard for replacing the “physical presence” standard. However, the Court held that South Dakota’s threshold of 200 annual transactions or \$100,000 was sufficient to exempt small companies from being overly burdened with requirements to withhold different taxes from different transactions.

Therefore, unfortunately, except for the few states that have legislated on this subject, there is little official guidance from courts or administrative agencies, regarding state regulatory compliance with respect to online charitable solicitations. Nonprofits that do not actively target donors in all 50 states should be wary of advice from consulting firms that may have a financial interest in arguing for a one-size-fits-all “national compliance” strategy. Instead, nonprofits will be better served to adhere to the Charleston Principles and stay abreast of developments in state law and case law on this issue.