

## MODERNIZING CHARITABLE FUNDRAISING REGULATION

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### ABSTRACT

*When a public charity solicits a specific number of donations within a state, it is usually required to register in that state and make public disclosures that allow government officials to confirm that the public charity is legitimate. However, public charities currently face wide variance from state to state with respect to the activity thresholds that trigger charitable solicitation registration. This variance significantly increases the compliance burden placed on under-resourced public charities seeking to conduct an online fundraising campaign. In the current regulatory environment, public charities must spend precious employee time on compliance tasks, as well as valuable organizational funding on attorney and accountant fees, to remain compliant across the states.*

*To solve this problem, this Article argues that the states should universally adopt a set of clear and consistent charitable solicitation registration standards. Additionally, this Article argues for the adoption of a new Unified Registration Statement, which would allow public charities to register to solicit donations in all states, using one form, one payment, and one online portal. By making these simple changes to the way the states regulate public charities, our society can better encourage mission-driven founders to launch public charities that will impact the lives of those in need, without impeding an*

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*individual state's ability to protect donors from fraudulent fundraising campaigns.*

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## INTRODUCTION

Small public charities<sup>1</sup> can have a significant positive impact on our society.<sup>2</sup> Often, it only takes a dedicated individual<sup>3</sup> with a social mission to launch a public charity that can impact hundreds, if not thousands, of people. Fortunately, given the societal benefits of these small public charities, the internet has made it easier than ever to launch a successful public charity.<sup>4</sup> For example, entrepreneurial founders utilize various technology-based resources that help reduce their operating costs, allowing them to direct a larger amount of funding to achieving their social mission.<sup>5</sup> The internet has also enabled small public charities to expand their reach by providing services over the web, allowing the public charity to impact people all over the world.<sup>6</sup> These advances in technology have

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1. This Article uses the term “public charity” throughout to refer to one of the two types of 501(c)(3) organizations under the Internal Revenue Code. Public charities are organizations that:

[a]re churches, hospitals, qualified medical research organizations affiliated with hospitals, schools, colleges and universities[;] [h]ave an active program of fundraising and receive contributions from many sources, including the general public, governmental agencies, corporations, private foundations or other public charities[;] [r]eceive income from the conduct of activities in furtherance of the organization’s exempt purposes[;] or [a]ctively function in a supporting relationship to one or more existing public charities.

*Public Charities*, INTERNAL REVENUE SERV., <https://www.irs.gov/charities-non-profits/charitable-organizations/public-charities> (last visited Sept. 6, 2021). This Article assumes that the public charities discussed are tax-exempt entities under the Internal Revenue Code, and Part III of this Article discusses compliance issues for public charities applying for and maintaining a tax exemption.

2. See, e.g., Julia Hyman, *Making a Difference: Meet 5 Young Adults Who Started Nonprofit Organizations*, NYMETROPARENTS (Oct. 25, 2017), <https://www.nymetroparents.com/article/nonprofit-charities-founded-by-kids> (sharing stories of teenagers who have launched small public charities to fight homelessness and aid those impacted by natural disasters).

3. See *id.* (discussing Hannah Taylor’s nonprofit organization, the Ladybug Foundation).

4. See, e.g., *id.* (highlighting the efforts of two children, Jake and Max, who used the internet to start their own nonprofit organization at the age of twelve).

5. For example, many new public charities will leverage free cloud computing resources (like those offered through Google Drive), free marketing resources (like those offered through Instagram), and free software (like the accounting software offered by Wave). See *infra* notes 27–30.

6. See *infra* Part I.

been positive developments for public charities over the past two decades.

However, new opportunities often lead to new problems. This has been true for small public charities that take advantage of new online opportunities, as new customers and expansion into new geographic areas often lead to new expenses.<sup>7</sup> These new expenses typically push the public charity to double its fundraising efforts by soliciting charitable donations from the new communities it has been able to serve online.<sup>8</sup> This is where most small, under-resourced public charities run into a significant problem.<sup>9</sup>

In the United States, there is wide variance from state to state with respect to the law governing charitable solicitation.<sup>10</sup> This variance amongst the states includes the threshold upon which registration for charitable solicitation is triggered for a public charity in a given state.<sup>11</sup> Today, a public charity with nationwide online activity could face charitable solicitation registration requirements in forty-one of the fifty states, incurring a registration fee in each state that requires one.<sup>12</sup> More significantly, ensuring compliance with these requirements, which also vary by state, can become an

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7. See *infra* Part II.

8. See generally *infra* notes 15, 16 and accompanying text (discussing the procedures and potential problems associated with expanding solicitation efforts).

9. See Lloyd Hitoshi Mayer & Brendan M. Wilson, *Regulating Charities in the Twenty-First Century: An Institutional Choice Analysis*, 85 CHI.-KENT L. REV. 479, 486–87 (2010).

[R]egulation of charity governance is a complex problem that deserves careful attention. As the number of charities continues to increase, existing federal and state regulatory resources will continue to be stretched and additional resources—or new approaches to regulation—will be needed to keep pace with the growth of the sector.

*Id.* at 486; see also *infra* notes 13–16 and accompanying text.

10. See, e.g., *infra* Section III.C.

11. See generally Karen I. Wu, “Click to Donate”: Which States Have Jurisdiction over My Online Fundraising?, *NONPROFIT Q.* (Apr. 6, 2018), <https://nonprofitquarterly.org/click-donate-states-jurisdiction-online-fundraising/> (discussing *The Charleston Principles: Guidelines on Charitable Solicitations Using the Internet* and how those non-binding principles have shaped the regulation of internet-based solicitation across the states).

12. See *Fundraising Compliance Guide*, HARBOR COMPLIANCE, <https://www.harborcompliance.com/information/charitable-registration> (Jan. 22, 2020).

expensive burden at best, and, at worst, an insurmountable obstacle to conducting an online fundraising campaign.<sup>13</sup>

These regulations place a public charity operating online in a lose-lose scenario.<sup>14</sup> On one hand, the public charity may choose to register to solicit charitable donations in many states, hoping to earn a return on its significant investment.<sup>15</sup> Alternatively, the public charity may find the large expense of “blanket” registration too costly and opt to restrict the set of states from which it seeks donations, also restricting its ability to raise funds in the process. Neither option is a great choice.

Interestingly, although charitable donation solicitation laws are imposed at the state level, a significant portion of the law governing public charities is enforced at the federal level.<sup>16</sup> These federal rules and regulations give public charities increased uniformity with respect to compliance issues.<sup>17</sup> Similarly, this Article calls for additional uniformity in charitable solicitation registration requirements, derived from more uniform regulations and registration processes amongst the states. Uniform regulations and registration processes would protect the public interest of ensuring public charity legitimacy while also giving public charities a much easier path to soliciting donations nationwide.

Part I of this Article presents a thorough summary of the current trends impacting public charities that operate online.

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13. *See id.* Even when a public charity is exempt from registration in a given state, it may still need to apply for an exemption. *Id.* To make matters worse, these registration and exemption requirements often occur on a yearly basis. *Id.*

14. *See generally* Melissa G. Liazos, *Can States Impose Registration Requirements on Online Charitable Solicitors?*, 67 U. CHI. L. REV. 1379 (2000) (discussing the historical context surrounding regulations for charities operating online).

15. Importantly, registering to solicit donations in another state can trigger new requirements for the nonprofit, like the need to hire a registered agent, become qualified to do business, and submit audited financial statements. *See* Wu, *supra* note 11.

16. Mayer & Wilson, *supra* note 9, at 938. Other scholars have argued that this “federalization” of the law of charity has occurred already in many respects. *See* Mark L. Ascher, *Federalization of the Law of Charity*, 67 VAND. L. REV. 1581, 1582 (2014) (“Federalization of the law of charity has now proceeded to such an extent . . . that it eclipses state law. Whether from a conceptual, organizational, or operational perspective, the crucial law relating to charity is now almost always federal.”).

17. *See infra* Section II.B.

Part II introduces key laws and regulations that impact public charities at the federal and state level. Part III shifts focus to state registration requirements for public charities that wish to solicit donations online. The second half of Part III also identifies key issues faced by public charities face when weighing the pros and cons of fundraising online, including the necessary registrations that may result across the fifty states. Lastly, in Part IV, this Article proposes solutions that could be implemented by the states that would benefit public charities, while also protecting the public interest of preventing fraudulent online fundraising operations.

#### I. INCREASED PROLIFERATION OF PUBLIC CHARITIES OPERATING ONLINE

The internet has given public charities three key opportunities. First, public charities have a significant opportunity to raise funds from new donor populations located all over the world. Second, key technology tools allow for public charities to complete necessary tasks more efficiently and on a cost-effective basis. Third, and most importantly, the internet has provided a new method for public charities to deliver services to consumers that were previously beyond the public charity's reach. Since most public charities define success based on their impact on a group of people with a defined need, an expanded reach allows for public charities with a niche focus to increase their chances of success by piecing together a geographically diverse group to serve.<sup>18</sup> These niche public charities serve an important societal purpose of providing aid to people whose unique needs may otherwise go unserved.<sup>19</sup> This Part contemplates these new opportunities for public

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18. See Joanne Fritz, *How Virtual Volunteering Works for Individuals and Nonprofits*, THE BALANCE SMALL BUS., <https://www.thebalancesmb.com/becoming-a-virtual-volunteer-4138357> (Apr. 9, 2020).

19. See, e.g., *Gamers Give Back*, CHILD'S PLAY, <https://www.childsplaycharity.org> (last visited Sept. 22, 2021) (providing an example of a public charity, Child's Play, that uses the internet to solicit video game donations on behalf of hospitals around the country for sick children).

charities in greater detail. This Part also considers the growth of the nonprofit sector generally and sets up a discussion regarding the impact that changes to the law of charitable solicitation could have on public charities and the communities they serve.

### A. Public Charities and Online Fundraising Success

The internet has given public charities a great opportunity to raise funds from new donors all over the world. Public charities were quick to launch a web presence in the late 1990s and early 2000s as those organizations believed that the internet could have a large impact on future fundraising efforts.<sup>20</sup> These predictions were correct: online charitable fundraising has taken off over the past two decades.<sup>21</sup> Online-based giving has seen double-digit percentage increases in this time<sup>22</sup> and new fundraising opportunities continue to emerge for public charities with a strong online presence.<sup>23</sup> Given this continued growth, the frontier of online fundraising continues to have

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20. See Hans Famularo, *Cyberspace Charities: Fundraising Tax Issues for Nonprofit Organizations in an Internet World*, 22 HASTINGS COMM'NS. & ENT. L.J. 301, 303 (1998) (detailing how nonprofit organizations began to utilize new internet tools, such as e-commerce and website registry, as a way to expand revenue sources in the late 20th century); Megan Donahue, *120 Years of Fundraising History: What Can We Learn?*, CAUSEVOX, <https://www.causevox.com/blog/fundraising-history/> (last visited Aug. 27, 2021).

21. See *10 Stats on the Staggering Growth of Online Giving in 2012*, ELEVENTY MKTG. GRP., <https://elevantygroup.com/2013/04/04/10-stats-on-the-staggering-growth-of-online-giving-in-2012/> (last visited Aug. 22, 2021); Donahue, *supra* note 20.

22. See ELEVENTY MKTG. GRP., *supra* note 21 (noting that there was a “21% online revenue increase for nonprofit organizations in 2012 over the previous year,” and a “20% increase in the overall number of online gifts received by nonprofit organizations in 2012”); see also *Online Giving Increased 12.1 Percent in 2017, Report Finds*, PND BY CANDID (Feb. 16, 2018), <https://philanthropynewsdigest.org/news/online-giving-increased-12.1-percent-in-2017-report-finds> (“Online giving in the United States increased 12.1 percent in 2017, while overall giving was up 4.1 percent.”).

23. See Kyle Shepherd, *Text Messaging and Peer to Peer*, M+R BENCHMARKS, <https://www.mrbenchmarks.com/editorial/text-messaging-and-peer-to-peerheadlines> (last visited Oct. 26, 2021) (“Nonprofit mobile audiences grew by 26% in 2020 . . . .”); see also Marjory Garrison, *Social Media*, M+R BENCHMARKS, <https://mrbenchmarks.com/editorial/social-media-headlines> (last visited Oct. 26, 2021) (“Revenue from Facebook Fundraisers increased by 14% overall . . . .”).

untapped potential for public charities looking to increase their funding and grow their impact.

*B. Public Charities Reducing Operating Costs through Technology Tools*

Due to the proliferation of digital tools available to entrepreneurs that allow them to tackle common tasks at a low cost, there has never been a less expensive time for entrepreneurs to launch a new venture.<sup>24</sup> This statement is equally true for social entrepreneurs operating a small public charity that are looking to tackle everyday tasks on their own in order to use a larger portion of their funding to fulfill the organization's charitable mission. These tools allow social entrepreneurs to take on expensive "professional" tasks, like the completion of accounting<sup>25</sup> or legal<sup>26</sup> work at a substantial cost savings. Other tools allow for social entrepreneurs to take everyday tasks, like graphic design<sup>27</sup> and social media,<sup>28</sup> into

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24. See David Nows, *Supporting Rural Entrepreneurship with Legal Technology*, 17 N.Y.U. J.L. & BUS. 391, 408 (2021) ("[L]aunching a new venture has never been less expensive . . . [n]ew, inexpensive tools exist for web design, messaging, communications, marketing, and other key business functions that allow new ventures to perform key tasks at a fraction of the prior cost.").

25. A common example of inexpensive accounting software is Quickbooks. See INTUIT QUICKBOOKS, <https://quickbooks.intuit.com/accounting> (last visited Oct. 26, 2021) (offering accounting software for as little as \$12 per month). Recently, other products have emerged as competitors to Quickbooks, which allows for small ventures to accomplish tasks related to accounting at either a low or no cost, in some cases. See, e.g., WAVE, <https://www.waveapps.com> (last visited Oct. 26, 2021) (offering accounting software for as little as \$0 per month).

26. Free tools from world-class law firms exist to help founders complete tasks like employee offer letters and intellectual property assignments. See Nows, *supra* note 24, at 408–10; see also David Nows & Jeff Thomas, *Delaware's Public Benefit Corporation: The Traditional VC-Backed Company's Mission-Driven Twin*, 88 UMKC L. REV. 873, 891–92 (2020) (contemplating a range of resources from law firms like Cooley LLP and Goodwin Procter LLP).

27. See, e.g., CANVA, <https://www.canva.com> (last visited Sept. 3, 2021) (providing an example of free, high-quality graphic design software that allows users to create a variety of marketing materials, including social media posts, brochures, posters, flyers, and video graphics).

28. Many social media websites like Facebook, Twitter, and Instagram allow for founders to create a page for their new venture (or public charity) in order to cultivate a following among that platform's users. See, e.g., Fit Small Business, *How to Create a Facebook Business Page in 7 Steps*, ENTREPRENEUR, <https://www.entrepreneur.com/article/309107> (last visited Sept. 3, 2021) (providing a step-by-step guide of how businesses, including public charities, can create a Facebook page to use as a way to engage with new audiences).



their own hands at no cost. Lastly, internet-based cost-saving tools exist for key tasks like advertising<sup>29</sup> and fundraising,<sup>30</sup> allowing public charities to leverage the internet to expand their audience even further. Given that these critical tasks are now substantially less expensive for public charities that choose to take advantage of technology, tech-savvy organizations can use their financial resources to serve more people and better fulfill their organizational mission.

### *C. Increasing the Customer Base of Public Charities Online*

The ability to raise more funding through the internet, coupled with the ability to decrease key expenses, seems like a winning formula for small public charities. However, the internet provides one more opportunity for these organizations that often leads to a need for even more funding. Given the internet's vast geographic reach, public charities now have the ability to impact a greater number of people, many of whom are dispersed geographically, by providing services via the internet.<sup>31</sup> This has two major effects. First, some small public charities that already exist will find themselves serving a growing "customer" base as their ability to provide services over the internet increases. Second, public charities that would not have been able to succeed with a local "customer" base can

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29. Typically, small organizations rely on low-cost advertising platforms like Google Ads and Facebook to help stretch their advertising budgets. See *id.*; 7 *Types of Advertising to Promote Your Small Business Effectively*, FRESHBOOKS,

<https://www.freshbooks.com/hub/marketing/types-of-advertising> (last visited Sept. 3, 2021). These data-driven platforms have the additional benefit of allowing small organizations to better target their desired market. See, e.g., *Create Your First Ad and Help Customers Choose Your Business*, GOOGLE ADS, <https://ads.google.com/home/how-it-works> (last visited Sept. 3, 2021) (stating that advertisements on the Google platform allow organizations to target specific customers and set a monthly "cap" on advertising spending).

30. See, e.g., CLASSY, <https://www.classy.org> (last visited Sept. 3, 2021) (providing an example of a platform that allows charitable organizations to create custom fundraising pages).

31. See Joanne Fritz, *How Virtual Volunteering Works for Individuals and Nonprofits*, THE BALANCE SMALL BUS., <https://www.thebalancesmb.com/becoming-a-virtual-volunteer-4138357> (Apr. 9, 2020) (explaining the growth of "virtual volunteer" opportunities and stating that a volunteer's "skills are no longer limited to [his or her] geographical location").

now serve a critical mass of people by providing services over the internet.<sup>32</sup>

A public charity's opportunity to increase its level of impact is one reason to celebrate the internet's effect on the nonprofit sector. After all, these organizations primarily exist to positively impact people in need, and internet utilization allows organizations to multiply that impact.<sup>33</sup> However, with greater organizational reach comes a greater need for organizational resources, like funding, to keep the public charity's momentum moving forward. A logical next step for these public charities is to increase online fundraising efforts, given the new geographic reach of the organization. However, as I will address in Part IV, with an expanded geographic footprint comes new fundraising compliance issues that present a significant challenge to most public charities.

#### D. *The Growth of the Nonprofit Sector Generally*

Thus far, Part I of this Article has discussed factors that have aided public charities in their pursuit of increased success in recent years. This subsection seeks to confirm those findings by sharing data that demonstrates the growth of the nonprofit sector during the age of the internet. This subsection will also focus on the large portion of the nonprofit sector that is made up of small public charities, which are discussed regularly throughout this Article.

Studies have shown that the number of Internal Revenue Code (IRC) § 501(c)(3) organizations has increased exponentially, reaching a total of 1.186 million in 2010.<sup>34</sup> Since

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32. *See id.*

33. *Id.* ("Virtual volunteering has helped many nonprofits to grow and broaden their impact.").

34. Mayer & Wilson, *supra* note 9, at 484–85.

Over the past thirty years, the number [of] charities registered with the IRS has grown exponentially, increasing from approximately 276,000 501(c)(3) entities in 1977 to 1.186 million such entities today. In addition to these 1.186 million registered charities, the charitable sector also includes thousands of churches and small charities that are not

that time, the number of § 501(c)(3) entities has continued to grow and reached 1.54 million in 2016.<sup>35</sup> A large number of these entities are classified as small organizations, as evidenced by the “[a]pproximately 35% of nonprofits registered with the IRS . . . that were required to file either a Form 990, Form 990-EZ, or Form 990-PF.”<sup>36</sup> Given this statistic, roughly 65% of all registered entities are eligible to file Form 990-N, or are exempt from IRS reporting requirements, signaling that they are small public charities with less than \$50,000 in annual gross receipts.<sup>37</sup> Furthermore, the majority of entities over the \$50,000 annual gross receipts threshold remain small to medium in size, with annual gross receipts below \$500,000.<sup>38</sup>

From this data, we can conclude that: (1) the number of public charities has steadily increased during the age of the internet; and (2) the vast majority of these organizations are small, with gross receipts of under \$500,000 annually.<sup>39</sup> Other scholars have pointed out that this growth in the number of public charities poses a potential problem as more charities may lead to a strain on resources of government actors that regulate the nonprofit sector.<sup>40</sup> Given this emerging problem, there is an opportunity to reform the way these organizations are governed at the

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required to register with the IRS in order to qualify as organizations exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code. When added together, the total number of charities in the U.S. likely exceeds 1.3 million entities.

*Id.*

35. NCCS Project Team, *The Nonprofit Sector in Brief 2019*, NAT'L CTR. FOR CHARITABLE STAT. (June 4, 2020), <https://nccs.urban.org/publication/nonprofit-sector-brief-2019#the-nonprofit-sector-in-brief-2019>.

36. *Id.*

37. *Id.*

38. *See id.* (“Even after excluding organizations with gross receipts below the \$50,000 filing threshold, small organizations composed the majority of public charities in 2016. . . . [Additionally,] 66.6 percent had less than \$500,000 in expenses.”).

39. *Id.*; *See* Mayer & Wilson, *supra* note 9, at 483–84.

40. *See id.* at 486–87.

These trends within the charitable sector suggest that regulation of charity governance is a complex problem that deserves careful attention. As the number of charities continues to increase, existing federal and state regulatory resources will continue to be stretched and additional resources—or new approaches to regulation—will be needed to keep pace with the growth of the sector.

*Id.*

federal and state level to ensure that government resources are allocated effectively. This reform has the added benefit of modernizing how the law applies to public charities, which is much needed in certain respects.<sup>41</sup>

## II. CURRENT REGULATIONS AFFECTING PUBLIC CHARITIES

There are important reasons for government actors to impose regulatory restrictions on the fundraising efforts of public charities. Perhaps most significantly, federal and state governments have an interest in ensuring tax exemptions are only enjoyed by legitimate public charities who seek to do good.<sup>42</sup> It is also important for governments to protect the public from fraudulent organizations that operate under the guise of serving a charitable purpose.<sup>43</sup> Given these important aims, public charities are actively regulated by federal, state, and local governments.

On the other hand, regulatory compliance is a significant and costly burden on legitimate public charities who operate to benefit the public.<sup>44</sup> For example, public charities must make detailed, regular disclosures to the Internal Revenue Service (IRS) to maintain their tax-exempt status.<sup>45</sup> Fortunately, this federal-level compliance work can be reused to meet some state

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41. See, e.g., *infra* Part III (discussing the challenges charities face related to outdated state regulations); *infra* Part IV (discussing charity regulation reforms that account for modern charities' internet presence).

42. See Liazos, *supra* note 14, at 1379.

43. See *id.* at 1379 (citing *Village of Schaumburg v. Citizens for a Better Gov't*, 444 U.S. 620, 636–38 (1980)) (stating that government entities may protect the public from fraudulent charitable solicitations through the regulation of such solicitation).

44. See Marsha Blumenthal & Laura Kalambokidis, *The Compliance Costs of Maintaining Tax Exempt Status*, 59 NAT'L TAX J. 235, 235 (2006). A 2006 survey estimated that compliance costs for nonprofits sat at \$3.2 billion for the year 2000. *Id.*

45. See *Form 990 Resources and Tools*, INTERNAL REVENUE SERV., <https://www.irs.gov/charities-non-profits/form-990-resources-and-tools> (last visited Oct. 27, 2021) ("A tax-exempt organization must file an annual information return or notice with the IRS, unless an exception applies.").

and local compliance requirements.<sup>46</sup> However, other state and local requirements force public charities to complete jurisdiction-specific forms,<sup>47</sup> pay added filing fees, and meet additional, unrelated requirements<sup>48</sup> in order to remain compliant. Lastly, some of these tasks clearly require the assistance of a paid expert, such as an attorney or an accountant, which adds another layer of expenses to an already costly set of compliance obligations. This detailed and scattershot compliance environment presents significant challenges for small public charities. At best, these compliance items deter funds and effort away from the organization's charitable purpose. At worst, the organization fails to meet its compliance obligations and ceases to carry its mission forward.

This Part provides a general overview of how public charities are regulated at the federal and state level. With respect to federal regulations, Section A focuses on IRS requirements that impact public charities. Regarding state-level regulations, Section B provides a general overview of the ways in which the states regulate public charities. Thus, this Part II offers a high-level overview of the compliance requirements imposed on public charities by various levels of government.

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46. See, e.g., MICH. COMP. LAWS § 400.273(2)(k) (2011) ("To register, a charitable organization must include . . . information about the charitable organization in the registration form. . . . [This information includes the] charitable organization's internal revenue service form 990, 990-EZ, 990-PF, or other 990-series return for the preceding tax year.").

47. See *The Unified Registration Statement*, THE MULTI-STATE FILER PROJECT, [http://multistatefiling.org/#no\\_states](http://multistatefiling.org/#no_states) (last visited Oct. 27, 2021) [hereinafter *The Unified Registration Statement*]. Three states do not allow for public charities to file the Unified Registration Statement (URS) in their state: Florida, Oklahoma, and Colorado. *Id.* These states have a registration form that is specific to their jurisdiction, which increases the regulatory burden on public charities that need to register in those states. *Id.*

48. See, e.g., CORP. & CHARITIES DIV., WASH. SEC'Y OF STATE, CHARITABLE ORGANIZATION REGISTRATION 1 (2018), [https://www.sos.wa.gov/\\_assets/charities/charitable-organization-registration.pdf](https://www.sos.wa.gov/_assets/charities/charitable-organization-registration.pdf) [hereinafter CHARITABLE ORGANIZATION REGISTRATION] (requiring out-of-state entities to provide their Washington UBI, which is a nine-digit number that entities receive when registering to do business in Washington with the State's Department of Revenue); see also *Business Licensing and Renewals FAQs*, WASH. STATE DEPT OF REVENUE, <https://dor.wa.gov/open-business/business-licensing-and-renewals-faqs#UBI> (last visited Oct. 27, 2021) ("A UBI number is a nine-digit number that registers you with several state agencies and allows you to do business in Washington State.").

### A. Federal Regulation of Public Charities

At the federal level, public charities encounter key regulations from two government entities: the IRS and the Federal Trade Commission (FTC). For example, the IRS imposes significant authority over public charities throughout an organization's lifecycle. First, public charities must apply for tax-exempt status prior to reaping its benefits.<sup>49</sup> Thereafter, the IRS requires these tax-exempt public charities to make regular informational disclosures in order to maintain tax-exempt status.<sup>50</sup> This Section outlines these IRS rules and the corresponding compliance methods used by public charities. Additionally, this Section discusses the FTC's role in regulating charitable activity. While the FTC Act does not directly govern public charity activities,<sup>51</sup> it does govern fraudulent charitable fundraising activities (which are classified as for-profit), as well as professional fundraisers acting in their legitimate, albeit for-profit, capacity, both of which are considered briefly in this subsection.<sup>52</sup>

#### 1. Applying for tax-exempt status using IRS Form 1023

The IRS requires most public charities that would like to receive tax-exempt status under § 501(c)(3) of the IRC to apply by completing IRS Form 1023 or IRS Form 1023-EZ.<sup>53</sup> Form 1023 is an extensive disclosure form that allows the IRS to thoroughly vet any public charity, including those that

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49. See *About Form 1023, Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code*, INTERNAL REVENUE SERV., <https://www.irs.gov/forms-pubs/about-form-1023> (last visited Oct. 27, 2021) [hereinafter *About Form 1023*].

50. See generally *Form 990 Series Which Forms Do Exempt Organizations File Filing Phase In*, INTERNAL REVENUE SERV., <https://www.irs.gov/charities-non-profits/form-990-series-which-forms-do-exempt-organizations-file-filing-phase-in> (last visited Oct. 27, 2021) [hereinafter *Form 990 Series*] (noting that "[m]ost tax-exempt organizations are required to file an annual return" and listing the required forms).

51. See generally 15 U.S.C. §§ 41–58 (outlining the governing authority granted to the FTC and failing to include public charities' activities as subject to FTC governance).

52. See 15 U.S.C. §§ 6102, 6106.

53. See generally *About Form 1023*, *supra* note 49 (explaining how, in order for an organization to apply for federal income tax exemption, they must fill out and submit Form 1023).

regularly have either \$50,000 in revenue or \$250,000 in total assets.<sup>54</sup> Alternatively, Form 1023-EZ allows public charities that meet these requirements to complete fewer disclosures and pay a reduced filing fee.<sup>55</sup> Lastly, organizations are presumed to be tax exempt without filing an application if the organization has annual gross receipts (i.e., the total amount of money the organization received from all sources during its annual accounting period, without subtracting any costs or expenses) that are normally not more than \$5,000 during their typical tax year.<sup>56</sup>

As a mechanism by which charities can obtain tax-exempt status, Form 1023 gives public charities the freedom to pursue unlimited revenue and hold unlimited assets.<sup>57</sup> Given that these rights are afforded to a public charity through the successful completion of Form 1023, the form contains more extensive disclosure requirements than its alternatives. Form 1023 contains nine parts that ask the applicant to: (1) identify the applicant organization; (2) provide the organizational structure of the applicant; (3) confirm that the organization has required language in certain organizational documents; (4) outline the organization's current and future activities; (5) describe how the organization compensates its officers, directors, and

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54. INTERNAL REVENUE SERV., FORM 1023: APPLICATION FOR RECOGNITION OF EXEMPTION UNDER SECTION 501(C)(3) OF THE INTERNAL REVENUE CODE, <https://www.irs.gov/pub/irs-pdf/f1023.pdf> [hereinafter FORM 1023: APPLICATION].

55. See *Form 1023 and 1023-EZ: Amount of User Fee*, INTERNAL REVENUE SERV., <https://www.irs.gov/charities-non-profits/form-1023-and-1023-ez-amount-of-user-fee> (last visited Sept. 2, 2021) [hereinafter *Form 1023 and 1023-EZ: Amount of User Fee*] (indicating a price of \$600 to file form 1023 and a price of \$275 to file form 1023-EZ); Yigit Uctum, *Form 1023 and Form 1023-EZ FAQs*, WEGNER CPAs (Jan. 30, 2020), <https://www.wegnercpas.com/form-1023-form-1023-ez-faqs/> (explaining that form 1023-EZ “is significantly easier and shorter than the Form 1023”).

56. *Public Charity – Tax Exemption Application*, INTERNAL REVENUE SERV., <https://www.irs.gov/charities-non-profits/charitable-organizations/public-charity-exemption-application> (last visited Sept. 2, 2021).

57. See generally Stephen Fishman, *How to Obtain Your 501(c)(3) Tax-Exempt Status for Your Nonprofit*, NOLO, <https://www.nolo.com/legal-encyclopedia/nonprofit-tax-exempt-status-501c3-30124.html> (last visited Aug. 27, 2021) (explaining “the real benefits of being a nonprofit flow from your 501(c)(3) tax-exempt status, such as the tax-deductibility of donations, access to grant money, and income and property tax exemptions”).

employees; (6) disclose the financial activities of the organization; (7) disclose whether the organization will be classified as a private foundation or a public charity; (8) provide the effective date of the application; and (9) disclose whether the applicant organization will claim an exemption from the IRS's annual disclosure requirements made via the Form 990 series of documents.<sup>58</sup> The IRS requires a payment of \$600 to file Form 1023.<sup>59</sup>

By the author's count, Form 1023 requires an applicant organization to answer 121 different questions, many of which require detailed written responses.<sup>60</sup> Further, certain types of organizations, such as schools, hospitals, churches, and low-income housing, must meet additional requirements in the form of schedules and attach supplementary documents and forms.<sup>61</sup> These requirements are incredibly burdensome to a new organization seeking tax-exempt status; in fact, the IRS estimates that the typical applicant will spend over two hundred hours filling out the form and completing related recordkeeping tasks required to fill out the form correctly.<sup>62</sup> This time burden is compounded by a potential cost burden as the cost of filing Form 1023 (\$600) is often minimal when

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58. See INTERNAL REVENUE SERV., INSTRUCTIONS FOR FORM 1023: APPLICATION FOR RECOGNITION OF EXEMPTION UNDER SECTION 501(C)(3) OF THE INTERNAL REVENUE CODE (2020) [hereinafter INSTRUCTIONS FOR FORM 1023].

59. See *Form 1023 and 1023-EZ: Amount of User Fee*, *supra* note 55.

60. See generally INSTRUCTIONS FOR FORM 1023, *supra* note 58, at (outlining general and specific instructions for how to fill out Form 1023 and what to include in the form); FORM 1023: APPLICATION, *supra* note 54.

61. See, e.g., INSTRUCTIONS FOR FORM 1023, *supra* note 58, at 18 (requiring that, as part of completing "Schedule B" of Form 1023, schools supply information identifying "incorporators, founders, board members, donors of land, and donors of buildings by name . . . whether individuals or organizations").

62. Alistair M. Nevius, *Form 1023-EZ: First-Year Results Are In*, J. OF ACCT. (Mar. 1, 2016), <https://www.journalofaccountancy.com/issues/2016/mar/irs-form-1023-ez.html>.

The IRS estimates taxpayers will need an average of almost [15.5] hours to prepare the [1023] form and all schedules, plus another almost 185 hours of recordkeeping and learning about the law or form. And while one can question the accuracy of the IRS's time estimates, the Service clearly anticipates that Form 1023 requires substantial effort to properly prepare.

*Id.*



compared to the attorney's fees that the public charity will incur, which are estimated to cost up to \$15,000.<sup>63</sup> Given the significant burden of the cost and disclosures required by Form 1023, it is advisable for a new public charity to utilize Form 1023-EZ if possible.

Form 1023-EZ significantly reduces the initial cost and disclosure burden placed on an organization. In fact, the IRS claims that an organization can complete the form and related recordkeeping tasks in under twenty hours.<sup>64</sup> This potential time savings is reflected in the form itself: Form 1023-EZ contains just under forty questions for an organization to answer, as compared to the approximately 121 questions listed on Form 1023.<sup>65</sup> These questions include only one "narrative" question, which asks the applicant to describe the organization's mission or most significant activities.<sup>66</sup> Filing Form 1023-EZ with the IRS costs \$275,<sup>67</sup> and attorneys specializing in completing the form on behalf of organizations do so for a fraction of the cost of completing Form 1023.<sup>68</sup> For small organizations who wish to receive tax-exempt status, Form 1023-EZ is clearly a time-saving and money-saving path forward, assuming the applicant meets the eligibility requirements.<sup>69</sup>

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63. See Ben Woodward, *How Much Does It Cost to File for 501c3 Tax Exemption*, NONPROFIT ELITE (June 2, 2020), <https://nonprofitelite.com/how-much-will-it-cost-to-get-501c3-tax-exempt-2>.

64. See Nevius, *supra* note 62.

65. Compare INTERNAL REVENUE SERV., FORM 1023-EZ: STREAMLINED APPLICATION FOR RECOGNITION OF EXEMPTION UNDER SECTION 501(C)(3) OF THE INTERNAL REVENUE CODE 1-3 (2014), <https://www.irs.gov/pub/irs-pdf/f1023ez.pdf> [hereinafter FORM 1023-EZ: STREAMLINED APPLICATION] (requiring applicants fill out a two-and-a-half page 1023-EZ form in order to apply for tax exemption from the IRS), with FORM 1023: APPLICATION, *supra* note 60 (requiring applicants fill out a twenty-eight page 1023 form in order to apply for tax exemption from the IRS).

66. See FORM 1023-EZ: STREAMLINED APPLICATION, *supra* note 65.

67. *Form 1023 and 1023-EZ: Amount of User Fee*, *supra* note 55.

68. See, e.g., *Pricing*, RICHARDS NONPROFIT L., LLC, <https://www.richardsonprofitlaw.com/pricing> (last visited Sept. 3, 2021).

69. Form 1023-EZ requires an applicant be a public charity and anticipate receiving less than \$50,000 in gross receipts during each of its first three tax years. See INTERNAL REVENUE SERV.,

Lastly, organizations do not need to complete Form 1023 or Form 1023-EZ and are presumed to be tax-exempt without filing either application if the organization has annual gross receipts under \$5,000 during its typical tax year.<sup>70</sup> For organizations on a very small budget, this offers an attainable path to tax-exempt status while the organization proves that there is a market for its services.

## 2. Continuing disclosure requirements for tax-exempt entities

Once an organization has been approved as a tax-exempt organization by the IRS, the organization has a continuing annual disclosure requirement. To fulfill this requirement, the organization must complete an appropriate Form 990 series disclosure and submit that disclosure to the IRS by the appropriate deadline.<sup>71</sup> This subsection outlines three of the four options in the Form 990 series (Form 990, Form 990-EZ, and Form 990-N), as each of these forms could apply to the public charities discussed in this Article. This subsection does not discuss Form 990-PF further as this Article does not focus on the private foundations covered by that form.<sup>72</sup>

All organizations classified as public charities may choose to file Form 990. Form 990 is designed to be the most extensive disclosure form for public charities, covering: (1) exempt activities, including narrative descriptions of key programs; (2) select non-exempt activities; (3) the organization's finances; (4) the organization's governance structure; (5) the compensation

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INSTRUCTIONS FOR FORM 1023-EZ 9-13 (2018), <https://www.irs.gov/pub/irs-pdf/i1023ez.pdf>. Additionally, certain types of organizations are required to use Form 1023, even if they meet the standard above. *See id.* at 13. Those organizations include private foundations, schools, hospitals, and churches, among others. *See id.* at 13-16.

70. *See Public Charity - Tax Exemption Application*, INTERNAL REVENUE SERV., <https://www.irs.gov/charities-non-profits/charitable-organizations/public-charity-exemption-application> (Sept. 3, 2021).

71. *See generally Form 990 Series*, *supra* note 50 (outlining the scenarios in which an organization would choose to file a Form 990, Form 990-EZ, Form 990-N, or Form 990-PF).

72. *See generally Private Foundations*, INTERNAL REVENUE SERV., <https://www.irs.gov/charities-non-profits/charitable-organizations/private-foundations> (Sept. 7, 2021) (discussing how private foundations must file Form 990-PF).

paid to officers, directors, trustees, and key employees; and (6) the organization's compliance with applicable tax law.<sup>73</sup> Given these extensive disclosure requirements, Form 990 is intended for the largest public charities and is required of all public charities with annual gross receipts above \$200,000 or total assets above \$500,000.<sup>74</sup> Tax-exempt organizations below these stated thresholds have the option of completing Form 990-EZ or Form 990-N in place of Form 990.<sup>75</sup> However, those same organizations may also choose to complete the more extensive disclosures in Form 990 if they so choose.<sup>76</sup>

Form 990-EZ and Form 990-N are abbreviated versions of Form 990, intended for smaller tax-exempt organizations in the public charity category. Form 990-EZ can be used by organizations with under \$200,000 in annual gross receipts and total assets below \$500,000.<sup>77</sup> Overall, Form 990-EZ requires disclosures in many of the same categories as Form 990, while asking for less detail with respect to each of the disclosures.<sup>78</sup> Smaller organizations with gross receipts of less than \$50,000 annually may file Form 990-N, which is an online-only "e-Postcard" version of Form 990.<sup>79</sup> Form 990-N represents an even smaller disclosure requirement (when compared to the other

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73. See INTERNAL REVENUE SERV., FORM 990: RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX 3-12 (2012), <https://www.irs.gov/pub/irs-prior/f990--2012.pdf>.

74. See *Form 990 Series*, *supra* note 50.

75. See *id.*

76. See generally *Annual Electronic Notice (Form 990-N) for Small Organizations FAQs: Who Must File*, INTERNAL REVENUE SERV., <https://www.irs.gov/charities-non-profits/annual-electronic-notice-form-990-n-for-small-organizations-faqs-who-must-file> (Sept. 7, 2021) (stating that organizations eligible to file Form 990-N may choose to file either Form 990 or Form 990-EZ, assuming they complete all disclosures required of the chosen form).

77. *Form 990 Series*, *supra* note 50.

78. Compare INTERNAL REVENUE SERV., FORM 990-EZ: SHORT FORM RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX 1-4 (2020), <https://www.irs.gov/pub/irs-pdf/f990ez.pdf> (demonstrating that the 990-EZ form is four pages long and contains fifty-two questions, not including sub-questions), with INTERNAL REVENUE SERV., FORM 990: RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX 3-12 (2012), <https://www.irs.gov/pub/irs-prior/f990--2012.pdf> (demonstrating that the 990 form is twelve pages long and contains 215 questions, not including sub-questions).

79. See *Form 990 Series*, *supra* note 50.

Form 990 series forms) for tax-exempt organizations operating on a limited basis financially.<sup>80</sup>

Lastly, it should be noted again that one of the Form 990 series disclosures is required on an annual basis, unless an organization meets an exemption, which is typically limited to religious and governmental organizations.<sup>81</sup> Most significantly, organizations that choose to neglect making this disclosure risk losing tax-exempt status<sup>82</sup> and the ability to conduct fundraising activities.<sup>83</sup>

### 3. Federal enforcement of legal requirements

The IRS is the only federal agency charged with the initial determination of whether a charity qualifies as tax exempt.<sup>84</sup> However, the FTC also has the ability to regulate charitable organizations it determines are fraudulent (meaning that the organization is really a for-profit organization), and professional fundraisers who aid legitimate charities (for a fee) in conducting fundraising campaigns.<sup>85</sup> With respect to

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80. See *Annual Electronic Filing Requirement for Small Exempt Organizations – Form 990-N (e-Postcard)*, INTERNAL REVENUE SERV., <https://www.irs.gov/charities-non-profits/annual-electronic-filing-requirement-for-small-exempt-organizations-form-990-n-e-postcard> (June 17, 2021).

81. See *Form 990 Series*, *supra* note 50; see also *Annual Exempt Organization Return: Who Must File*, INTERNAL REVENUE SERV., <https://www.irs.gov/charities-non-profits/annual-exempt-organization-return-who-must-file> (Sept. 23, 2021).

82. See *Annual Exempt Organization Return: Penalties for Failure to File*, INTERNAL REVENUE SERV., <https://www.irs.gov/charities-non-profits/annual-exempt-organization-return-penalties-for-failure-to-file> (Sept. 23, 2021). Organizations that fail to file an applicable Form 990 series for three consecutive years may have their tax-exempt status automatically revoked by the IRS. See *id.*

83. See *Fundraising Compliance Guide: Charitable Solicitation Registration and Compliance*, HARBOR COMPLIANCE, <https://www.harborcompliance.com/information/charitable-registration> (Jan. 22, 2020). While the IRS does not directly prohibit organizations from engaging in fundraising activities, the Form 990 series disclosure is typically used at the state level to confirm that a public charity may conduct fundraising activities in a given state. See, e.g., STATE OF MINN., SUPPLEMENT TO THE UNIFIED REGISTRATION STATEMENT ANNUAL REPORT FORM INSTRUCTIONS 5 (2021) [https://www.ag.state.mn.us/charity/Forms/URS\\_AnnRepForm.pdf](https://www.ag.state.mn.us/charity/Forms/URS_AnnRepForm.pdf).

84. See James J. Fishman, *Who Can Regulate Fraudulent Charitable Solicitation?*, 13 PITT. TAX REV. 1, 17 (2015) (noting that the IRS “regulates the nonprofit sector through setting the criteria for recognition of tax-exempt organizations”).

85. See *id.* at 35.

fraudulent charitable organizations, the FTC derives its jurisdiction from its power to regulate for-profit enterprises, with the stated goal of preventing unfair or deceptive acts affecting interstate commerce.<sup>86</sup> Given that professional fundraisers operate on a for-profit basis, they also fall under the FTC's watch.<sup>87</sup> This Article does not contemplate these FTC-related enforcement issues further, given that the tax-exempt organizations contemplated by this Article: (1) are not fraudulent; and (2) are unlikely to use professional fundraisers, given the organization's limited budget.

With respect to federal requirements rooted in tax law, the IRS has mechanisms in place to ensure organizations receiving tax-exempt status are qualified by law to receive that benefit.<sup>88</sup> These mechanisms include the Form 1023 series forms for the initial grant of tax-exempt status, and the Form 990 series disclosures for the continuing maintenance of tax-exempt status.<sup>89</sup> The IRS can use these disclosures to ensure that public charities meet both the organizational and operational tests meant to confirm that these organizations are operating for exempt purposes.<sup>90</sup>

Additionally, these disclosures help to ensure that public charities are not engaged in activities that are prohibited by the tax code, which include: (1) the private inurement of assets to insiders; (2) lobbying; (3) activities related to political campaigns; (4) generating excessive unrelated business income; (5) failing to operate within the boundaries of the organization's stated exempt purpose; or (6) failing to meet the annual

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86. See 15 U.S.C.S. § 45(a)(2).

87. See Fishman, *supra* note 84, at 36 ("There have been a few [FTC] enforcement efforts against fundraisers, which have been undertaken with state attorneys general or charity officials.").

88. See *supra* Section II.A.1.

89. See *supra* Sections II.A.1, II.A.2.

90. See 26 C.F.R. § 1.501(c)(3)-1 (2021); *What Is the IRS Form 990?*, INTUIT TURBOTAX, <https://turbotax.intuit.com/tax-tips/irs-tax-forms/what-is-the-irs-form-990/L4asnXqjZ> (Oct. 16, 2021, 1:36 AM) (explaining that Form 990 is used by the IRS because the IRS wants "to ensure that the organization is worthy of maintaining its tax-exempt status and requires more details on the types of activities it engages in during the year").

reporting obligations of the Form 990 series.<sup>91</sup> The IRS has the ability to revoke a public charity's tax-exempt status in the event that it engages in one of the above prohibited activities.<sup>92</sup> Alternatively, the IRS will automatically revoke the organization's tax-exempt status if the organization does not file the relevant Form 990 series disclosure for three consecutive tax years.<sup>93</sup> The consequences of losing tax-exempt status are severe and range from the need to file a federal income tax return and pay income taxes, to losing the ability to receive tax-deductible contributions from donors.<sup>94</sup>

### B. State Regulation of Public Charities

The states are very involved in the regulation of public charities. For example, at the earliest stage of a public charity's existence, it must form a legal entity in the state of its choice.<sup>95</sup> Each state provides a menu of relevant entity forms available in

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91. *How to Lose Your 501(c)(3) Tax Exempt Status (Without Really Trying)*, NONPROFIT RISK MGMT. CTR., <https://nonprofitrisk.org/resources/articles/how-to-lose-your-501c3-tax-exempt-status-without-really-trying/> (last visited Aug. 30, 2021) [hereinafter *How to Lose Your 501(c)(3) Tax Exempt Status*]; *Exemption Requirements - 501(c)(3) Organizations*, INTERNAL REVENUE SERV., <https://www.irs.gov/charities-non-profits/charitable-organizations/exemption-requirements-501c3-organizations> (Mar. 4, 2021).

92. See *How to Lose Your 501(c)(3) Tax Exempt Status*, *supra* note 91; see also *Exemption Requirements - 501(c)(3) Organizations*, *supra* note 91.

93. See *Automatic Revocation - How to Have Your Tax-Exempt Status Reinstated*, INTERNAL REVENUE SERV., <https://www.irs.gov/charities-non-profits/charitable-organizations/automatic-revocation-how-to-have-your-tax-exempt-status-reinstated> (Sept. 23, 2021).

94. See *Publication 557 (02/2021), Tax-Exempt Status for Your Organization*, INTERNAL REVENUE SERV., [https://www.irs.gov/publications/p557#en\\_US\\_202001\\_publink1000199876](https://www.irs.gov/publications/p557#en_US_202001_publink1000199876) (Feb. 2021).

If [an] organization's tax-exempt status is automatically revoked, [it] may be required to file one of the following federal income tax returns and pay any applicable income taxes: Form 1120, *U.S. Corporation Income Tax Return* . . . or Form 1041, *U.S. Income Tax Return for Estates and Trusts* . . . In addition, a section 501(c)(3) organization that loses its tax-exempt status can't receive tax-deductible contributions and won't be identified in the IRS Business Master File extract as eligible to receive tax-deductible contributions, or be included in Tax-Exempt Organization Search.

*Id.*

95. *Id.*; see *Before Applying for Tax-Exempt Status*, INTERNAL REVENUE SERV., <https://www.irs.gov/charities-non-profits/before-applying-for-tax-exempt-status> (Sept. 23, 2021) ("State law governs nonprofit status, which is determined by an organization's articles of incorporation or trust documents.").

their jurisdiction that allow a public charity to meet that state's requirements for tax-exempt organizations.<sup>96</sup> Once a public charity has chosen a state of formation and entity type, the state in which the entity has been formed also has the ability to ensure that the officers and board members of the public charity observe all legal requirements, including their fiduciary duties to the organization.<sup>97</sup> Each of these regulatory requirements typically stems from an individual state's Corporations Act or Nonprofit Corporations Act.<sup>98</sup> These state powers are not particularly notable, however, as state governments regularly serve the role of registering business entities and regulating their continuing existence in both the for-profit and nonprofit arenas.<sup>99</sup>

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96. See Lloyd Hitoshi Mayer, *Fragmented Oversight of Nonprofits in the United States: Does It Work? Can It Work?*, 91 CHI.-KENT. L. REV. 937, 939 (2016) [hereinafter *Fragmented Oversight of Nonprofits in the United States*] (“[S]tate law provides the legal forms for nonprofits and imposes the related fiduciary duties on governing board members and officers.”).

97. See Garry W. Jenkins, *Incorporation Choice, Uniformity, and the Reform of Nonprofit State Law*, 41 GA. L. REV. 1113, 1124–25 (2007).

Before receiving the generous tax benefits afforded to an exempt organization under federal law, charitable organizations must be formed as legally recognized entities under state law, usually as trusts or nonprofit corporations. Since most nonprofit entities are structured as nonprofit corporations, state law has an enormous impact on the nonprofit sector. Of course, the level, the nature, and the details of state-level regulation vary from jurisdiction to jurisdiction. Just like their for-profit counterparts, nonprofit corporations may choose their state of incorporation, and, by affirmatively making such a selection, organizations determine the set of state laws that will govern their internal affairs.

*Id.*

98. *Id.* at 1125. The states have taken different approaches to codifying the law that applies to tax-exempt organizations. See, e.g., N.Y. NOT-FOR-PROFIT CORP. LAW §§ 101–1411 (Consol. 2021) (providing an example of a typical nonprofit-specific act); MASS. ANN. LAWS ch. 180, §§ 1–29 & ch. 156B, §§ 1–116 (LexisNexis 2021) (providing an example of a state that has used its general corporate laws to govern tax-exempt organizations); see also Jenkins, *supra* note 97, at 1125 (discussing how the ABA has been involved in state-level charity reform by revising its model Nonprofit Corporations Act).

99. Jenkins, *supra* note 97, at 1126. States have differing requirements with respect to the laws governing public charities. See *id.* For example, California requires only one director to form a nonprofit public benefit corporation (its version of a nonprofit corporation, not to be confused with benefit corporations generally); however, Michigan requires its nonprofit corporations to have a minimum of three directors. Compare CAL. CORP. CODE § 5151 (Deering 2021) (“The number or minimum number of directors may be one or more.”), with MICH. COMP. LAWS § 450.2505 (2021) (“The board . . . shall consist of [three] or more directors.”).

Once formed, public charities are regulated in their state of formation, as well as any other states where the public charity engages in relevant activities triggering compliance requirements.<sup>100</sup> For example, states regularly examine the fundraising activities of public charities that solicit donations from their residents, requiring the public charity to register in the state when the public charity has solicited donations from the state's residents on a "repeated and ongoing basis," or on "a substantial basis."<sup>101</sup> These concepts are well defined in some states, but lack definition in others. This lack of consistency amongst the states is the topic of significant discussion in Part III.<sup>102</sup> Lastly, states also have the power to ensure that charitable assets deployed by a public charity remain dedicated to charitable purposes<sup>103</sup> and to provide federally tax-exempt entities similar tax exemptions at the state level.<sup>104</sup> Although important, these topics are not the focus of the remainder of this Article.

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100. See Jenkins, *supra* note 97, at 1169.

101. THE CHARLESTON PRINCIPLES: GUIDELINES ON CHARITABLE SOLICITATIONS USING THE INTERNET, NAT'L ASS'N OF STATE CHARITY OFFS. 3 (2001) [hereinafter THE CHARLESTON PRINCIPLES: GUIDELINES], <http://www.nasconet.org/wp-content/uploads/2018/04/Charleston-Principles.pdf>. This language is derived from *The Charleston Principles*, a guidance document created by the National Association of State Charity Officials to help guide states in creating new laws to govern online fundraising. See *id.* As of 2018, only three states (Colorado, Mississippi, and Tennessee) had defined these concepts as they apply to the solicitation of charitable donations in their state. See Wu, *supra* note 11, at 3. All other states with charitable solicitation registration requirements do not have clear-cut thresholds alerting tax-exempt organizations to register in a given state. See *id.*

102. See *infra* Part IV.

103. See ROBERT A. WEXLER, ATTORNEY GENERAL REGULATION OF HYBRID ENTITIES AS CHARITABLE TRUSTS 10 (2013), <https://academiccommons.columbia.edu/doi/10.7916/D8CN7CDK/download>.

According to the commentary accompanying the Model Protection of Charitable Assets Act . . . , thirty-seven states have statutes related to the Attorney General's duty to monitor charitable assets, and five of those states have very limited authority. In the states that best regulate charitable assets some version of the 1954 Uniform Supervision of Trustees for Charitable Purposes Act . . . is the law.

*Id.*

104. See Mayer, *supra* note 96, at 939 ("[S]tates often grant at least some nonprofits exemption from income, property, sales, and other taxes, subject to various conditions and under the oversight of their revenue or tax offices.").



### III. STATE-LEVEL REGULATION OF CHARITABLE SOLICITATION

This Part III shifts focus to a specific subset of regulations applicable to public charities: state-level regulation<sup>105</sup> of charitable donation solicitation.<sup>106</sup> Public charities face inconsistent regulations across the fifty states with respect to the level of solicitation activity required to trigger a given state's charitable solicitation registration requirement.<sup>107</sup> Section A begins with a discussion of *The Charleston Principles*, a set of recommended rules for the states to use when regulating public charities that solicit donations online.<sup>108</sup> Then, Section B compares *The Charleston Principles* to the actual regulation of charitable donation solicitation by the states. Next, Section C discusses why the current state-level regulatory regimes create a significant burden that is placed on a public charity and its resources. Lastly, Section D analyzes how public charities have a difficult time remaining in compliance with such burdensome regulations, despite spending significant amounts of time and money on compliance efforts.

#### A. *The Charleston Principles*

State regulators predicted that the internet would cause unique issues for the regulation of charitable donation solicitation when they met in Charleston, South Carolina in October 1999.<sup>109</sup> At this installment of the National Association of State Charity Officials ("NASCO") Conference, one of the

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105. See generally Evelyn Brody, *Sunshine and Shadows on Charity Governance: Public Disclosure as a Regulatory Tool*, 12 FLA. TAX REV. 175, 180 (2012) ("Almost all the states require registration; a charity soliciting in many states will welcome the Uniform Registration Statement accepted in most states requiring registration [and that] 35 states require annual filings, usually with the attorney general, for charitable trusts and nonprofit corporations that solicit charitable contributions. . .").

106. See generally *id.*

107. See *id.*

108. See generally THE CHARLESTON PRINCIPLES: GUIDELINES, *supra* note 101.

109. See THE CHARLESTON PRINCIPLES: GUIDELINES, *supra* note 101, at 1 ("[S]tate charity officials discussed the formation of these Principles . . . [at a conference] in October 1999. During the public portion of that conference, which was devoted to the subject of Internet solicitations, state charity officials began a dialogue with invited guests on this topic.").

main agenda items for these state regulators was to address the rapidly increasing impact of the internet on their enforcement of solicitation laws against charitable entities located in other states.<sup>110</sup> Specifically, the internet (and online fundraising activity) was on the cusp of creating a new fundraising environment for public charities, which would allow these public charities to solicit charitable donations from new donors, who could be located anywhere an internet connection was available.<sup>111</sup>

In 1999, state laws governed the solicitation of charitable donations in each individual state, but they did not contemplate the geographic breadth of solicitation activity that the internet was about to unlock for public charities of all sizes.<sup>112</sup> In the years to come, public charities would begin to host websites and solicit online donations with the click of a button.<sup>113</sup> Importantly, it seemed more likely that public charities would receive donations from geographically dispersed donors in the years to come, and state regulators wanted to devise uniform principles for how to handle the regulation of this solicitation by public charities.<sup>114</sup>

On one hand, state regulators have a responsibility to protect their citizens from fraudulent fundraising activities by

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110. *See id.*

111. *See id.* (noting the “proliferation of Web site solicitations”); *see, e.g.*, Michael Stein & James Kenyon, *A Decade of Online Fundraising*, *NONPROFIT Q.* (Dec. 21, 2004), <https://nonprofitquarterly.org/a-decade-of-online-fundraising> (explaining how the first nonprofits devised “printable donation forms along with credit card processing pages” to reach a wider audience of donors via the internet).

112. *See* THE CHARLESTON PRINCIPLES: GUIDELINES, *supra* note 101, at 2 (“Although existing state laws govern charitable solicitations on the Internet, in many instances the use of the Internet raises new questions that state charity officials must answer in order to effectively carry out their statutory missions.”).

113. *See, e.g.*, Nick Barbieri, *One-Click Donations. Is This Real Life?* CHARITY DYNAMICS, <https://www.charitydynamics.com/one-click-donations-real-life/> (last visited Aug. 31, 2021) (“A one-click donation process allows donors to store credit card information so that all future contributions can be made with a single click of a link or text (SMS).”).

114. *See* THE CHARLESTON PRINCIPLES: GUIDELINES, *supra* note 101, at 1 (“The proliferation of Web site solicitations compels state charity officials to address the issue of who has to register where. . . . Consistent guidelines addressing online charitable solicitations will assist state charity officials, as well as donors, charities, and online entrepreneurs, throughout the nation.”).

enforcing charitable solicitation registration requirements. These registration laws are meant to require public charities to disclose information to the public about the organization's charitable activities and its use of donor funds. Regulators use these disclosures to verify the legitimacy of a public charity, and the public may use the disclosed information to determine the suitability of a given charity when engaging in charitable giving.<sup>115</sup>

On the other hand, a state regulating out-of-state public charities that solicit donations online could present two potential issues for that state-level enforcement agency. First, enforcing registration requirements against public charities that receive a small number of donations and small dollar amount of donor funds from the citizens of a given state could lead to an unnecessary and expensive burden being placed on public charities conducting fundraising efforts online. This is especially true for public charities that receive a few small donations from dozens of states. In these cases, the requirement of charitable solicitation registration could create a hurdle that prevents small public charities from receiving this critical funding from donors.<sup>116</sup> In a worst-case scenario, state-level charitable solicitation registration requirements could discourage the founders of the public charity from launching their venture in the first place, given the complexity of navigating these rules.

Secondly, the state regulators also risk wasting their limited resources on regulating a new flood of legitimate public charities from other states, instead of focusing their efforts on fraudulent fundraisers within their own jurisdiction. At the time of the 1999 NASCO conference in Charleston, state-level regulators believed that the internet would introduce new

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115. See *infra* Section III.C.

116. *Id.* To avoid this problem, *The Charleston Principles* contemplates a Unified Registration System in section IV(A) that would allow multi-state filers to reduce their administrative burden. THE CHARLESTON PRINCIPLES: GUIDELINES, *supra* note 101, at 5–6. *The Charleston Principles* state that these systems are “strongly encouraged.” *Id.*

opportunities for public charities to increase their ability to fundraise from potential donors.<sup>117</sup> This prediction proved to be true: the number of public charities, the vast majority of which are considered small organizations,<sup>118</sup> has increased at an exponential rate,<sup>119</sup> and these charities are increasingly relying on internet-based donations.<sup>120</sup> Given these predictable future trends, state regulators correctly believed that they needed to be careful to balance their duty to protect the public against fraud with the need to provide access to an emerging avalanche of new, small, and legitimate public charities seeking donor dollars from their state's citizens. If NASCO did not strike the right balance in drafting *The Charleston Principles*, state-level regulators risked wasting precious regulatory resources on restricting legitimate charitable fundraising activities in their state.

Given the need to balance these important concerns, the state-level regulators drafted *The Charleston Principles* in a way that provides significant flexibility to the states in implementing the core ideas agreed upon at the 1999 NASCO conference. *The Charleston Principles* require a public charity to register in a given state (in which the public charity is not domiciled)<sup>121</sup> based on its internet activity when the following conditions are met: (1) the entity either (a) "solicits contributions through an interactive Web site;" or (b) "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 Web site[;]" and (2)

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117. See THE CHARLESTON PRINCIPLES: GUIDELINES, *supra* note 101, at 8 ("Internet fundraising appears to create the opportunity for newer and smaller charities to compete more successfully . . . . To the extent that Internet fundraising is less expensive than the more traditional uses of direct mail and telemarketing, more money raised should be available for the charity's program service accomplishments.").

118. See NCCS Project Team, *supra* note 35.

119. See Mayer & Wilson, *supra* note 9, at 484–85; see also NCCS Project Team, *supra* note 35.

120. See, e.g., BLACKBAUD INST., CHARITABLE GIVING REPORT 5 (2017).

121. See THE CHARLESTON PRINCIPLES: GUIDELINES, *supra* note 101, § III(B)(1).

either (a) “[s]pecifically targets persons physically located in the state for solicitation[.]” or (b) “[r]eceives contributions from the state on a repeated and ongoing basis or a substantial basis through its Web site.”<sup>122</sup>

*The Charleston Principles* are not binding upon state regulators; instead, they provide helpful guidance to state regulators in enforcing their already-existing state law when public charities fundraise online.<sup>123</sup> Thus, the above rules may provide some helpful clarity for public charities and regulators in instances where: (1) a public charity’s website specifically targets individuals in a given state through its solicitation efforts; and (2) the public charity sends email messages to residents of the state or contacts them in other ways specifically to promote its website. In these instances, it is clear that *The Charleston Principles* encourage a state to enforce its charitable solicitation registration requirements against the public charity. Given this clarity, a public charity has the ability to avoid any legal “gray-area” in these situations by simply registering in each state where it meets these criteria.

However, *The Charleston Principles* lack clarity with respect to how they impact public charities that receive contributions from within a state through the organization’s website on “a repeated and ongoing basis” or on “a substantial basis.” Instead, NASCO left the heavy lifting to the states—each state must define these concepts on its own. Here lies the problem: since the approval of *The Charleston Principles* in 2001, the states have done very little to clarify the definitions of “repeated and ongoing basis” and “substantial basis” for public charities. More specifically, only three states have taken the step to

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122. *Id.* § III(B)(1)(b)–(c).

123. *Id.* § I(A) (“States are encouraged to use these Principles to develop common policies to implement their specific state laws, but these Principles are not necessarily the views of any particular individual, office, or state, nor do they state an official policy position of NASCO. These Principles recognize that the laws of individual states vary, and that implementation of these Principles may also vary.”).

further define these concepts.<sup>124</sup> These three states have defined “substantial basis” in similar ways, coalescing around the annual donation threshold of \$25,000 (although Colorado provides for other ways that public charities may meet the requirement).<sup>125</sup> However, the three states have deviated dramatically in how they define “repeated and ongoing basis.”<sup>126</sup> For each state, “repeated and ongoing basis” is defined by a set threshold number of donations received.<sup>127</sup> The threshold number varies significantly amongst the three states, ranging from twenty-five donations per year in Mississippi to one hundred donations per year in Tennessee.<sup>128</sup> Lastly, only three states requiring registration have issued guidance on how they define these thresholds, which makes compliance difficult for public charities.<sup>129</sup>

Despite the fact that *The Charleston Principles* were approved by NASCO nearly twenty years ago, public charities continue to face major hurdles when fundraising online. First, *The Charleston Principles* were meant to provide consistent guidance for public charities to help them determine when the organization needs to register to solicit charitable donations in a given state.<sup>130</sup> However, the lack of clarity surrounding the definitions of “repeated and ongoing basis” and “substantial

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124. See Wu, *supra* note 11.

To date, only three states have adopted rules or regulations with specific numerical thresholds for applying the ‘repeated and ongoing’ or ‘substantial’ concepts. Their approach to the third prong of the *Principles* involves analyzing three specific data points: [the n]umber of online donations received from a state in a fiscal year; [the t]otal online donations received (in dollars) from a state in a fiscal year; and [the p]ercentage of total contributions comprising the *online* contributions from a state in a fiscal year.

*Id.*

125. See *id.* Importantly, Colorado deviates from Mississippi and Tennessee by using the \$25,000 figure to define “substantial basis” and allowing public charities to trigger this “substantial basis” registration requirement if more than 1% of their total online contributions come from Colorado, even if that amount is below \$25,000. *Id.*

126. See *id.*

127. See *id.*

128. *Id.*

129. See *id.*

130. See THE CHARLESTON PRINCIPLES: GUIDELINES, *supra* note 101, § I(A).

basis” have eliminated a public charity’s ability to clearly understand when to register in a given state.<sup>131</sup> To date, forty-six states that require registration have not provided public charities with guidance on these concepts.<sup>132</sup> Alternatively, the three states that have provided guidance have given inconsistent standards for public charities to meet.<sup>133</sup> This creates an environment where the leaders of small public charities have little clarity on how to comply with state law across jurisdictions.<sup>134</sup> While larger public charities with significant resources may choose to “play it safe” by hiring an attorney, registering to solicit donations across the states that require it, paying the necessary filing fees, and filing the required recurring paperwork, this is rarely an option for a small public charity. The remainder of this Part addresses the question of how small public charities should handle this predicament.

*B. State Law Requirements When a Public Charity Registers in a Given State*

Given the lack of consistent standards across the country, a challenging question for small public charities that seek donations online is whether they should register to solicit donations in multiple states.<sup>135</sup> This Section provides an

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131. See Wu, *supra* note 11.

132. See *id.*

133. See *id.*

134. See *id.*

135. Public charities must register to solicit charitable donations in their state of domicile, regardless of their online activity. See THE CHARLESTON PRINCIPLES: GUIDELINES, *supra* note 101, § III(A)(1); see also Edward A. Fallone, *Crowdfunding and Sport: How Soon Until the Fans Own the Franchise?*, 25 MARQ. SPORTS L. REV. 7, 13 n.35 (2014).

It is not clear under the law whether the passive operation of a website that accepts contributions can be viewed as the solicitation of persons nationwide. Therefore, cautious nonprofits might be advised to register their solicitation with all fifty states and the District of Columbia, or at least to file the Uniform Registration Form, which is accepted by thirty-six States and the District.

*Id.*

overview of the strategic considerations of a small public charity in making this determination.

The following is an established reality for all public charities: “[a]n entity that is domiciled within a state and uses the Internet to conduct charitable solicitations in that state must register in that state.”<sup>136</sup> While this requirement originates from *The Charleston Principles*, which is not binding law in any state, the law of most states generally reflects the idea that public charities that are domiciled in a state must register to solicit donations in that state.<sup>137</sup> Additionally, registration requirements also extend to public charities that are not domiciled in a given state but maintain a physical presence in that state.<sup>138</sup> In practical terms, these rules imply that public charities should plan to register to solicit donations in: (1) the public charity’s state of domicile; (2) the public charity’s state of incorporation (if different than its state of domicile)<sup>139</sup>; and (3) any state where the public charity has a physical presence through a chapter, branch office, affiliate, or a person soliciting contributions within the state.<sup>140</sup> Further, activities like in-person fundraiser events, telephone solicitation, and direct mail solicitation all allow for some degree of knowledge as to the location of the person being solicited for donations. Given this knowledge, a public charity should understand when it needs

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136. THE CHARLESTON PRINCIPLES: GUIDELINES, *supra* note 101, § III(A)(1). In this case, we say an entity is “domiciled” in a state when its principal place of business is in that state. *See id.* § III(A)(2).

137. For example, the applicable statutes in states like Michigan and Pennsylvania assume that all “charitable organizations” domiciled within the state are subject to registration requirements and extend these requirements to charitable organizations that are domiciled outside of the state but also have a physical presence inside of the state as well. *See, e.g.*, 10 PA. CONS. STAT. §§ 162.3, 162.5 (2021); MICH. COMP. LAWS §§ 200.273(1), 400.272(a) (2021).

138. *See, e.g.*, 10 PA. CONS. STAT. § 162.3 (2021); MICH. COMP. LAWS § 400.272(a) (2021).

139. For example, California defines “charitable corporation” as “any nonprofit corporation organized under the laws of this State for charitable or eleemosynary purposes and any similar foreign corporation doing business or holding property in this State for such purposes.” CAL. GOV’T CODE § 12582.1 (West 2021). Applicable law requires charitable corporations to register to solicit donations in California. *Id.* § 12585(a) (discussing registration requirement); *see also id.* § 12586.1 (discussing consequences of operation and solicitation without proper registration).

140. *See, e.g.*, 10 PA. CONS. STAT. §§ 162.3, 162.5 (2021); MICH. COMP. LAWS §§ 200.273(1), 400.272(a) (2021).



to register in a given state based on these criteria. For public charities that incorporate in a state and operate solely in that state, it is typical to only need to register in the one state.<sup>141</sup>

Of course, soliciting donations via the internet is an activity that is much more difficult for the states to regulate, since physical location is often a less relevant concept. This is why *The Charleston Principles* encourages states to require out-of-state public charities to register for charitable solicitation when the public charity “[r]eceives contributions from the state on a repeated and ongoing basis or a substantial basis through its Web site.”<sup>142</sup> The drafters of *The Charleston Principles* intended to encourage the states to expand upon their existing legislation in this area to more clearly require out-of-state public charities to register in cases where they have sufficient “minimum contacts” with the state.<sup>143</sup> However, some states have not followed through in drafting new laws that would clearly require registration for certain public charities soliciting donations online.<sup>144</sup>

Simply put, there is a significant legal gray area for public charities soliciting donations online. Public charities cannot rely on clear laws that tell them when to register to solicit donations in a given state. Without clear legal standards governing solicitation activity online, small public charities are forced to take on the unreasonably large expense of working with an

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141. See Wu, *supra* note 11; see also THE CHARLESTON PRINCIPLES: GUIDELINES, *supra* note 101, at 1.

142. THE CHARLESTON PRINCIPLES: GUIDELINES, *supra* note 101, § III(B)(1)(b)(2)(ii).

143. See *id.*, § I(A). *The Charleston Principles* briefly mention the concept of “minimum contacts” in the appendix section, demonstrating that the drafters were keenly aware of the issues (such as litigation) that could be posed for state regulators who overreach in enforcing charitable solicitation registration requirements. See *id.*, at 16; see also *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (expanding on the concept of “minimum contacts” in stating that “the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State [but is whether] . . . the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there”).

144. See Wu, *supra* note 11 (“To date, only three states have adopted rules or regulations with specific numerical thresholds for applying the ‘repeated and ongoing’ or ‘substantial’ concepts.”).

attorney to make registration determinations on a state-by-state basis. Unfortunately, this means that the alternative presented to these public charities—skipping registration in one or more states and hoping for the best—is often the lesser of two evils.

*C. The Pain of State-by-State Registration for Public Charities*

Three factors highlight the difficulties small public charities face when attempting to complete state registration forms. First, the information required to complete registration forms is significant and can vary substantially from state to state.<sup>145</sup> Second, it is often the case that a public charity will need to hire one or more outside experts, such as an accountant or attorney, in order to complete each state registration correctly.<sup>146</sup> Third, the time and monetary burden<sup>147</sup> imposed by varying registration requirements in each state can command a

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145. For example, many states that accept the Unified Registration Statement also require separate “state supplement” forms, which ask for varying information. *See Required Supplementary Forms for Filing in Addition to the Unified Registration Statement (URS)*, THE MULTI-STATE FILER PROJECT, [http://multistatefiling.org/e\\_tpforms.htm](http://multistatefiling.org/e_tpforms.htm) (last visited Sept. 8, 2021) (listing by state the required supplementary forms that need to be filed in addition to the Unified Registration Statement). Furthermore, other states do not accept the Unified Registration Statement and require public charities to complete a state-specific registration form. *See Which States Require Registration of Charitable Soliciting Organizations and Do Not Accept the URS?*, THE MULTI-STATE FILER PROJECT, [http://multistatefiling.org/index.html#no\\_states](http://multistatefiling.org/index.html#no_states) (Mar. 2014) [hereinafter *Which States Require Registration of Charitable Soliciting*] (stating that Colorado, Oklahoma, and Florida do not accept the Unified Registration Statement).

146. *See Charitable Solicitation Registration*, NAT’L COUNCIL OF NONPROFITS, <https://www.councilofnonprofits.org/tools-resources/charitable-solicitation-registration> (last visited Aug. 30, 2021).

Some nonprofits hire the accountant/CPA that prepares the nonprofit’s IRS [Form] 990 to also prepare and submit state charitable registration forms, since much of the information required by states for charitable registration is the same information that the nonprofit reports on its annual report to the IRS, Form 990. Other nonprofits outsource this project to a specialized service provider or law firm equipped to prepare state registration forms. Still other nonprofits prepare the forms using internal staff.

*Id.*

147. *See id.* (“[F]or nonprofits seeking to file charitable registration forms in all the states where registration is required, the cost of filing fees plus labor for preparation of the forms can be significant.”); *see also Fragmented Oversight of Nonprofits in the United States*, *supra* note 96, at 959 (“While the regulatory goals of the various states are presumably the same—protection of their residents from fraudulent or deceptive fundraising—the numerous registration and reporting requirements for charities that solicit contributions in multiple jurisdictions is duplicative and a significant burden on both the states and nonprofits.”).

significant portion of a small public charity's resources, limiting the funds that it can then direct to achieving its social mission. This Section describes each of these three difficulties in further detail.

### 1. Completing registration forms

Charities must provide specific information in order to successfully complete charitable solicitation registration forms. The Unified Registration Statement ("URS") provides an example of the typical nature of these required forms, which includes information about an organization's governing structure, budget, and tax obligations.<sup>148</sup> The URS is a single form that public charities may file in multiple states to meet the charitable solicitation registration requirement in those states.<sup>149</sup> In light of its purpose, the URS should streamline registration for public charities, essentially allowing them to fill out one form, check a box for each state the public charity would like that form sent to, and pay any filing fees in one transaction. In practice, however, the URS does not function in this manner. Instead, public charities fill out the URS and are able to submit the URS form to only some states.<sup>150</sup> Other states accept the URS

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148. See NAAG/NASCO, UNIFIED REGISTRATION STATEMENT (URS) FOR CHARITABLE ORGANIZATIONS (v. 3.10) 1 (2007), <https://www.ag.state.la.us/Files/Article/291/Documents/InitialCharitableRegistrationForm.pdf> [hereinafter UNIFIED REGISTRATION STATEMENT].

149. See Stephen Urich, *The Unified Registration Statement (URS): Is it Useful?*, LABYRINTH, INC. (Apr. 8, 2021), <https://labyrinthinc.com/unified-registration-statement> ("[The URS] was originally created to help nonprofits complete multiple charitable solicitation registrations at once. The intent behind the URS is to round up all of the registration essentials in a single document, to which the registering nonprofit can then add more required documentation as needed for specific states.").

150. See Ron Barrett, *Why New Charitable Registration Filers Should Not Blindly Use the URS*, COGENCY GLOB. (Apr. 14, 2016), <https://www.cogencyglobal.com/blog/why-new-charitable-registration-filers-should-not-blindly-use-the-urs>. For example, the state of Hawaii allows public charities to use the URS to fulfill the state's registration requirement. See TAX AND CHARITIES DIV., STATE OF HAW. DEP'T OF THE ATT'Y GEN., ANSWERS TO FREQUENTLY ASKED QUESTIONS ABOUT HAWAII'S CHARITY REGISTRATION REQUIREMENTS 3 (2019), <https://ag.hawaii.gov/tax/files/2019/10Frequently-Asked-Questions.pdf> ("Hawaii uses an internet-based registration system for organizations to complete and submit their unified registration statement (URS).").

form but also require a supplemental form requesting additional information from the public charity.<sup>151</sup> Even worse, a few states do not accept the URS at all and require public charities to register using a state-specific form.<sup>152</sup> Submitting these state-specific registration forms—URS or otherwise—is inconvenient for public charities as they must submit registration forms individually to each state’s relevant agency and pay each state’s<sup>153</sup> applicable filing fees as well.<sup>154</sup> Lastly, while the URS can be helpful for initial registrations, it is less helpful for renewal registrations as fewer states accept the URS for this purpose.<sup>155</sup>

While filing registration forms on a state-by-state basis is fairly burdensome, actually filling out the registration forms can present an even larger challenge for public charities. For example, the URS is not an easy form to complete, as it requires intimate knowledge of the public charity’s history, its accounting practices, and relevant law.<sup>156</sup> In states requiring the

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151. See, e.g., THE OFF. OF MINN. ATT’Y GEN., SUPPLEMENT TO THE UNIFIED REGISTRATION STATEMENT ANNUAL REPORT FORM INSTRUCTIONS, [https://www.ag.state.mn.us/charity/Forms/URS\\_AnnRepForm.pdf](https://www.ag.state.mn.us/charity/Forms/URS_AnnRepForm.pdf) [hereinafter SUPPLEMENT TO URS FORM INSTRUCTIONS].

152. See *Which States Require Registration of Charitable Soliciting*, *supra* note 145 (providing a list of states that do not accept the URS).

153. The cost of filing fees can add up for public charities, but many states provide for a filing fee structure that allows small public charities to pay a nominal amount. See, e.g., N.Y. STATE OFF. OF THE ATT’Y GEN., NYS ANNUAL FILING FOR CHARITABLE ORGANIZATIONS 2 (2020), [https://charitiesnys.com/pdfs/CHAR500\\_2019.pdf](https://charitiesnys.com/pdfs/CHAR500_2019.pdf) (allowing organizations with a low “net worth” to pay less than \$100 in annual filing fees); STATE OF CAL. DEP’T OF JUST., ANNUAL REGISTRATION RENEWAL FEE REPORT TO ATTORNEY GENERAL OF CALIFORNIA 1 (2017), [https://oag.ca.gov/sites/all/files/agweb/pdfs/charities/charitable/rrf1\\_form.pdf](https://oag.ca.gov/sites/all/files/agweb/pdfs/charities/charitable/rrf1_form.pdf).

154. See NAT’L COUNCIL OF NONPROFITS, *supra* note 146 (stating that, at some point in the future, “there may be a single website portal where a nonprofit can submit directly to multiple states all the information required to register for fundraising purposes, but until that process exists, charitable nonprofits must submit individual registrations to various state agencies in each of the states where the nonprofit will be soliciting donations”).

155. See Urich, *supra* note 149 (“Two states currently accept the URS as a primary registration method: Kentucky and Louisiana.”).

156. For example, the URS asks specific *legal* questions, like “[h]as the organization applied for or been granted IRS tax exempt status”; *accounting* questions about the organization’s total contributions and expenses; and questions requiring intimate knowledge about the organization’s history, such as a question that asks an organization to “indicate all methods of

URS plus a state-specific supplement, the depth of questions can become even more significant. For example, Minnesota requires many public charities to provide two pages of financial disclosures within its state supplement form.<sup>157</sup> Additionally, the state also requires the following items to complete a public charity's registration: "(1) IRS Form 990, 990-EZ, 990-PF, or 990-N plus all schedules and attachments"; (2) "IRS Form 990-T (if the organization files one)"; (3) "[a] full list of the organization's board of directors, including names, addresses, and total compensation paid to each"; (4) "[a]n audit prepared in accordance with generally accepted accounting principles by an independent CPA or LPA if the organization has total revenue of more than \$750,000"; (5) a "\$25 registration fee"; and (6) a "\$50 late fee, if the organization failed to request an extension or submit its complete report by the due date."<sup>158</sup>

The above requirements represent the registration requirements for *one state*. Public charities soliciting donations online are likely to repeat a similar process in dozens of states.<sup>159</sup> Adding to this difficulty is the significant variance in the threshold requirements triggering registration from state to state.<sup>160</sup> For example, Minnesota provides an exemption from charitable solicitation registration for public charities that receive less than \$25,000 in total contributions during the public charity's accounting year.<sup>161</sup> This dollar amount threshold

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[charitable] solicitation" they use or have used. UNIFIED REGISTRATION STATEMENT, *supra* note 148, at 1-3.

157. See SUPPLEMENT TO URS FORM INSTRUCTIONS, *supra* note 151, at 5-6. In total, public charities are asked to complete forty-five lines of financial disclosures on the Minnesota URS supplement. See *id.*

158. *Id.* at 2.

159. See *Registration and Reporting – Charities and Charitable Trusts*, NAT'L COUNCIL OF NONPROFITS, <https://www.councilofnonprofits.org/tools-resources/charitable-solicitation-registration> (last visited Aug. 30, 2021) ("A charitable organization must register with the Attorney General's Office as a charitable trust if it has assets of more than \$25,000 at any point in time during the year and is not required to register as a soliciting charity.").

160. *Id.*

161. See *id.* ("Soliciting charities must register if . . . [t]he charity receives or plans to receive more than \$25,000 in total contributions during its accounting year."); see also MINN. STAT. § 309.515(1)(a)(1) (2019). Other states have similar thresholds which trigger registration

required for registration differs significantly from the dollar amount requirement in the nearby state of Illinois, which sets its threshold at \$15,000.<sup>162</sup> Registration thresholds also exist in some states for the number of donors located in that state, and, as expected, these requirements are also inconsistent across states.<sup>163</sup> While Mississippi considers twenty-five or more donors located within the state<sup>164</sup> to constitute “repeated and ongoing” activity that warrants registration, Colorado sets its threshold number of donors at fifty.<sup>165</sup> These inconsistencies from jurisdiction to jurisdiction make it so that public charities must check the relevant law in every jurisdiction in which they might need to register. This significant burden placed on public charities would be easily avoided with some coordination amongst the states.

## 2. *The need for outside experts*

One group that benefits handsomely from the lack of coordination amongst the states are attorneys. Most public charities, even those with very limited financial resources, should look to an attorney to navigate these complex and differing state registration rules. Without such expert advice, public charities run the risk of noncompliance in one or more states. The cost of legal noncompliance can be significant for public charities. From a financial perspective, state-issued

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requirements, although the specific dollar amount can vary. *See* Wu, *supra* note 11; *see generally* NAT'L ASS'N OF STATE CHARITIES OFFS., STATE CHARITY REGISTRATION PROVISIONS (2020), <https://www.nasconet.org/wp-content/uploads/2020/05/NASCO-State-Charities-Registration-Survey-5.15.20-.pdf>. It is important for small public charities to realize that they should track compliance with exemption thresholds, as passing a given state's threshold amount can require the public charity to subsequently register with that state. *Id.*

162. *See* 225 ILL. COMP. STAT. 460/3(a) (1991).

163. *Compare* STATE OF MISS. SEC'Y OF STATE, MISSISSIPPI CHARITIES ACT RULES 5, 9 (2017), [https://www.sos.ms.gov/content/documents/sec\\_char/Revised%20Rules%20-%20Clean.pdf](https://www.sos.ms.gov/content/documents/sec_char/Revised%20Rules%20-%20Clean.pdf) (requiring charities with twenty-five or more donors located within the state to register), *with* 8 COLO. CODE REGS. § 1505-9:9.1.2(a) (2002) (requiring charities with fifty or more donors located within the state to register).

164. *See* MISSISSIPPI CHARITIES ACT RULES, STATE OF MISS. SEC'Y OF STATE 5, 9 (2017), [https://www.sos.ms.gov/content/documents/sec\\_char/Revised%20Rules%20-%20Clean.pdf](https://www.sos.ms.gov/content/documents/sec_char/Revised%20Rules%20-%20Clean.pdf).

165. *See* 8 COLO. CODE REGS. § 1505-9:9.1.2(a) (2002).

penalties can add up quickly.<sup>166</sup> For example, the state of Maryland may fine a public charity up to \$5,000 per violation of its applicable registration law.<sup>167</sup> For the many public charities that are uncomfortable operating under the risk of significant fines, working with an attorney to avoid these violations provides an appealing solution.

While the high costs associated with non-compliance are a good reason for public charities to register, legal compliance with state-level registration law is arguably more important for public charities due to reputational concerns.<sup>168</sup> It is very easy for a public charity to appear to be an undesirable recipient of donor funding when the public charity has violated the law and those violations have been publicized.<sup>169</sup> Public charities should fear the reputational hit the organization could take if it receives such bad publicity.<sup>170</sup> Simply put, a public charity does not want to deal with angry donors and clients, or disappointed board members. These occurrences are an easy way to lose the support of those key constituents, which can harm the viability and longevity of the public charity.<sup>171</sup> Given these concerns, the

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166. See MD. CODE ANN., BUS. REG. § 6-619(a) (LexisNexis 2021).

167. *Id.*

168. See Greg McRay, *The Penalties for Failing to Register for Charitable Solicitations*, FOUND. GRP. (Aug. 3, 2017), <https://www.501c3.org/penalties-for-failing-to-register-for-charitable-solicitations>; Nick Price, *Who Governs Nonprofit Organizations?*, BOARDEFFECT (Feb. 21, 2018), <https://www.boardeffect.com/blog/governs-nonprofit-organizations> (“A breach of trust casts a negative shadow on a nonprofit’s reputation that will be difficult, and maybe impossible, to overcome.”).

169. *Id.*

170. See generally Deborah L. Rhode & Amanda K. Packel, *Ethics and Nonprofits*, STAN. SOC. INNOVATION REV. (2009), [https://ssir.org/articles/entry/ethics\\_and\\_nonprofits](https://ssir.org/articles/entry/ethics_and_nonprofits) (describing a poll that revealed that one in ten Americans surveyed “strongly believed that charities are honest and ethical in their use of donated funds” but that almost “one in three believed that nonprofits have ‘pretty seriously gotten off in the wrong direction,’” ultimately concluding that this finding is “particularly troubling for nonprofit organizations that depend on continuing financial contributions”).

171. In fact, scholars have previously asserted that social entrepreneurs are likely to choose the nonprofit form due to the “warm-glow” it has as compared to for-profit alternatives. See generally Usha Rodrigues, *Entity and Identity*, 60 EMORY L.J. 1257 (2011). Insofar as social entrepreneurs choose the nonprofit form for its “warm-glow,” they are likely to vigorously defend the entity’s reputation to maintain that benefit. See *id.* at 1264.

utilization of attorneys for compliance purposes is important for reputational reasons too.

Lastly, a second group of experts provide services that are legally required of most public charities: accountants. As mentioned above, some states require a set of audited financial statements for registered public charities.<sup>172</sup> These statements can only be produced by accountants.<sup>173</sup> Furthermore, accountants can play a significant role in a public charity's preparation of its IRS Form 1023 series disclosure, as well as its IRS Form 990 series disclosure.<sup>174</sup> These are some of the most important disclosures the public charity will prepare, and it is important that the disclosures be completed correctly. Thus, public charities, regardless of size or funding level, must have room in their budget for accounting assistance.

### 3. *Organizational burden of registration*

Although experts play a role in helping public charities register to solicit donations, many public charities are not able to pass on all of this state-level registration work to outside experts. Instead, the core team operating the public charity may spend days or weeks of its time each year on registration-related tasks. The time and effort spent on these tasks has significant costs for the charitable organization, both in terms of the money paid to these team members for their work on registration-related tasks and also with respect to the human resources that are diverted away from achieving the

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172. See SUPPLEMENT TO URS FORM INSTRUCTIONS, *supra* note 151, at 2.

173. See Max Freedman, *What Is an Audited Financial Statement?*, BUSINESS.COM (Dec. 17, 2020), <https://www.business.com/articles/audited-financial-statement> (defining an audited financial statement as "any financial statement that a certified public accountant (CPA) has audited [and] will ensure that the statement adheres to general accounting principles and auditing standards" and noting that "[w]ithout this CPA verification, investors and lenders may not be confident that the statement you're presenting is accurate").

174. See *generally About Form 1023*, *supra* note 49; see also DEP'T OF THE TREASURY, INTERNAL REVENUE SERV., FORM 1023-EZ: STREAMLINED APPLICATION FOR RECOGNITION OF EXEMPTION UNDER SECTION 501(C)(3) OF THE INTERNAL REVENUE CODE (2021), <https://www.pay.gov/public/form/preview/pdf/101>.



organization's social mission.<sup>175</sup> Although losing financial resources to compliance is an important issue for public charities, the lost time and effort that could have been directed toward achieving the organization's social mission is arguably more significant.<sup>176</sup> This loss of money, time, and effort should cause state regulators to ask if they can do a better job of reducing this burden on public charities by creating registration requirements that are consistent from state to state.

*D. Risk Incurred by a Public Charity When It Does Not Register in a Given State*

Public charities have a multitude of considerations in deciding whether to register to solicit donations in a given state. In a perfect world, public charities would have crystal clear information *ex ante* regarding the likelihood of receiving sufficient donations from the citizens of a particular state to justify the cost of registration and burdens of continuing disclosure. However, we do not live in this perfect world, and public charities rarely have complete information regarding the likelihood of raising funds from donors in a given state.<sup>177</sup>

While public charities may have reliable data on the volume of donations received from a state when they serve citizens in that state,<sup>178</sup> the practice of receiving charitable contributions online introduces a level of unpredictability as to where donations come from and when they are received. For example, some public charities provide the people they serve with the ability to create custom fundraising pages to share their stories

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175. See John Boitnott, *4 Reasons Why It's Time to Hire an Accountant for Your Small Business*, ENTREPRENEUR (Oct. 7, 2020), <https://www.entrepreneur.com/article/356782>.

176. See generally Marsha Blumenthal & Laura Kalambokidis, *The Compliance Costs of Maintaining Tax Exempt Status*, 59 NAT'L TAX J. 235 (2006) (discussing the hours it takes for organizations to complete accounting exercises themselves, as well as the time and stress organizations would save if they allowed accountants to do the accounting work instead).

177. See *id.*

178. See, e.g., *Donor Data Retention*, FOUND. GRP., <https://www.501c3.org/kb/donor-data-retention> (Dec. 6, 2018) (stating that public charities must keep donor records for five years, but donation-tracking programs allow public charities to keep this information forever, if desired).

and how the charity has impacted their lives.<sup>179</sup> From there, the customer fundraising page can be shared via social media and sent to others through e-mail, text message, or other means of digital communication.<sup>180</sup> Sharing via the internet can lead to quick and seemingly random waves of new donations from people who have encountered the online donation page. These donors can be located anywhere in the world, and it can be almost impossible for public charities to predict where those donors are located *ex ante*. Given this common scenario, public charities rarely have the means to predict where online donations will come from, and when those donations will occur.

This inability to predict where online donations will come from geographically makes the strategic planning of registration efforts virtually useless for small public charities. Public charities are thus placed in the position of having to go through the arduous—and expensive—registration process in the states where they likely have donors, only to then receive significant and unexpected donations from other states where they are not registered. This thought process is likely to lead small public charities that solicit donations online to land in one of two groups: (1) those that register in every state that requires registration; or (2) those that register in the states where they regularly receive donations but forego registration and take their chances as an unregistered public charity in all other states.

There are pros and cons to each of these approaches. For example, registering to solicit donations in every state that requires it assures a public charity's compliance with those states' solicitation laws. However, registration also introduces a host of other legal obligations that the public charity must satisfy and, if the public charity has not received effective legal counsel, it may not be aware of such obligations and fail to

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179. See, e.g., CLASSY, *supra* note 30.

180. See *id.*

comply with them.<sup>181</sup> Thus, registering in every state is potentially risky, particularly from a legal compliance perspective, if the small public charity has not received comprehensive legal advice from a qualified attorney.

On the other hand, public charities that decide to take their chances by registering in only a handful of states risk legal action from state regulators.<sup>182</sup> This potential legal exposure is triggered in one of two ways. A public charity found “targeting”<sup>183</sup> citizens of a given state by soliciting such citizens for donations will need to register with the state, or else risk legal action. Similarly, a public charity that does not target citizens in a state, but still receives donations from citizens of the state that surpass donation or funds thresholds, will also need to register in order to avoid potential legal action.<sup>184</sup> In either scenario, the public charity operates under legal risk if it does not choose to register to solicit donations in the applicable state.

Public charities have several considerations to wade through prior to choosing whether to register in a state. First, public charities need to ask themselves if they plan to target individuals in a given state through online fundraising efforts like a direct e-mail campaign. If they do, it is very likely that the public charity will need to register in that state.<sup>185</sup> Of course, public charities can have some idea of where the individuals on the organization’s internet solicitation list reside by keeping an up-to-date client relationship management (“CRM”) system equipped with said information. While the information in the CRM may be imperfect and out-of-date in some cases, it nonetheless provides evidence of a good faith attempt at compliance by the public charity.<sup>186</sup> If the public charity elects

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181. See, e.g., CHARITABLE ORGANIZATION REGISTRATION, *supra* note 48 (asking a host of questions regarding the legal and financial status of the applicant).

182. See, e.g., MICH. COMP. LAWS § 400.290 (2021).

183. See *infra* Section IV.B.

184. See THE CHARLESTON PRINCIPLES: GUIDELINES, *supra* note 101, at 4–5.

185. See *id.* at 3.

186. See *id.* at 12–13.

to not register in a given state, it needs to have a plan to actively avoid “targeting” individuals in that state.<sup>187</sup> This could involve some rather conservative measures to ensure compliance, such as taking e-mail addresses off of the solicitation list if the recipient has not updated their contact information, including home state, for a period of time. Such measures negatively impact a public charity’s ability to raise funds, so the public charity must balance these compliance concerns with the realities of conducting a successful fundraising campaign.

Second, even if the public charity avoids “targeting” individuals in a given state, it needs to track each and every donation it receives in order to account for the dollar amount of the donation and the state from which the donation originated.<sup>188</sup> Doing so allows the public charity to avoid crossing one of the thresholds that triggers registration requirements in some states.<sup>189</sup> These thresholds vary from state to state and apply to both the dollar amount of donations received and the number of individual donors from the state.<sup>190</sup> Once a threshold is passed, the public charity typically has a set number of days to register in the state.<sup>191</sup>

#### IV. THE SOLUTION: MORE UNIFORM COMPLIANCE RULES ACROSS THE FIFTY STATES

As discussed in Part III, the current state-level regulatory regimes for the registration of public charities heavily burden small public charities that solicit donations online. This Part outlines methods the states can implement to make compliance

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187. *See id.* at 9.

188. *See* Wu, *supra* note 11 (“[I]t is increasingly important for organizations to monitor how much they are generating in donations online, and from whom.”).

189. *See, e.g., Soliciting Charity Registration and Reporting*, THE OFF. OF THE MINN. ATT’Y GEN. KEITH ELLISON, <https://www.ag.state.mn.us/Charity/InfoCharitableorgandTrusts.asp> (last visited Aug. 13, 2021) (noting how, in Minnesota, donations exceeding \$25,000 trigger registration requirements); 225 ILL. COMP. STAT. 460/3(a)(2) (1991) (noting how, in Illinois, donations exceeding \$15,000 trigger registration requirements).

190. *See infra* notes 216–18 and accompanying text.

191. *See, e.g.,* CAL. GOV’T CODE § 1285(a) (Deering 2021).

less burdensome on small public charities, while maintaining the same level of protection to the public against fraudulent fundraisers. Specifically, this Part discusses two actions that states can take to further this goal. First, states should adopt a new URS (the “New URS”) that meets the needs of every state that requires public charities to register for donation solicitation. This New URS would allow for each state to receive adequate disclosures from a public charity prior to approving its registration to solicit donations. Moreover, the New URS would also allow for public charities to complete one filing to satisfy its registration burden, unlocking the ability to fundraise on a national level. Second, states should standardize registration thresholds that impact out-of-state public charities who solicit donations online. This standardization benefits public charities by providing a single set of tests to apply to its fundraising activities in each state. This allows the states to reduce the compliance burden placed on public charities while also increasing the likelihood that public charities will be able to navigate registration regulations and comply with a given state’s rules.

#### *A. A Truly Universal Registration Statement*

The easiest way for the states to reduce the regulatory burden placed on public charities by state-level registration requirements is to create a truly universal registration statement. The New URS would be a comprehensive charitable solicitation registration form that every state accepts for purposes of registration compliance. By creating such a registration form, public charities would be able to eliminate disclosures that are required by only one state (or a small handful of states), replacing them with a form that is consistent across jurisdictions.<sup>192</sup> One way to create some consistency with the New URS is to rely on disclosures made through the IRS

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192. See, e.g., SUPPLEMENT TO URS FORM INSTRUCTIONS, *supra* note 151 (providing an example of a current state-level registration supplement form).

Form 990 series, when appropriate.<sup>193</sup> Given that all public charities have already made these disclosures, using them for the New URS could be a significant time-saving benefit for public charities. Lastly, to make the New URS as effective as possible, a national organization like NASCO could build an online portal for public charities to submit the organization's New URS and pay each state's registration fees through a single website via a single form and payment.<sup>194</sup> While there have been recent efforts that have launched such a portal, only two states have signed on as of 2021, making its utility quite limited.<sup>195</sup> However, to achieve constructive uniformity, states should significantly increase their efforts to make a nationwide portal a reality.

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193. See *Fragmented Oversight of Nonprofits in the United States*, *supra* note 96, at 961.

There are, however, two areas where consolidation may improve efficiency without undermining any existing advantages. One such area is the gathering of relevant information by the IRS, both through the application process and the required annual information returns. As a general matter, consolidation of information gathering—if that information can then be easily shared with all relevant governmental authorities—takes advantage of economies of scale while reducing duplicative burdens on both those authorities and the regulated community. This conclusion therefore supports not only having states continue to rely on the Form 990 as the primary if not exclusive reporting mechanism for charitable solicitation.

*Id.*

194. Other scholars have mentioned the idea of a single internet portal for public charity reporting and disclosures. See *Fragmented Oversight of Nonprofits in the United States*, *supra* note 96, at 962 (“A better approach would therefore be to complete the ongoing efforts to coordinate the registration and reporting obligations by permitting charities to use a single Internet portal and common form for these purposes so as to reduce this duplication without undermining state authority in this area.”). There appears to be some traction for this idea too, although it is not yet a reality. See also SINGLE PORTAL MULTISTATE CHARITIES REGISTRATION, A NASCO PUBLIC INTEREST INITIATIVE FOR INFORMATION SHARING AND DATA TRANSPARENCY, URB. INST. (2015), [https://www.urban.org/sites/default/files/2015/11/23/state\\_regulators\\_gano\\_1\\_-\\_single\\_portal\\_summary\\_one\\_page\\_summary\\_2015sept.pdf](https://www.urban.org/sites/default/files/2015/11/23/state_regulators_gano_1_-_single_portal_summary_one_page_summary_2015sept.pdf) (“The Multistate Registration and Filing Portal, Inc., a Delaware nonprofit corporation . . . continues moving forward with its plan to build an online system that will allow nonprofit organizations and their professional fundraisers to comply with all states’ registration and annual filing requirements through a single online portal.”).

195. See *The State Charity Registration Portal*, MULTISTATE REGISTRATION & FILING PORTAL: MRFP, <https://mrfp.forms.fm/the-state-charity-registration-portal/forms/4742> (last visited Sept. 4, 2021) (including a form for multi-state charity registration, currently limited to Georgia and Connecticut).

To accomplish this task, the individual states need to work together to create a new URS that contains all of the disclosures needed to effectively ensure public charities are in compliance with state solicitation laws. The political component of this process is “easier said than done.”<sup>196</sup> Given this complex political component, this Article does not contemplate the specific disclosures that should be included in the New URS. However, precedent shows that states have previously worked together in order to create *The Charleston Principles*<sup>197</sup> and the original URS.<sup>198</sup> The amount of time that has passed since these measures were implemented also allows the states to reflect upon the ineffectiveness of the original URS. This measure has been ineffective mainly because of the states’ inability to work together in implementing consistent disclosure standards for the good of all parties involved. States should therefore revisit the URS with the goals of: (1) agreeing upon a New URS to be used in all states; and (2) completing the implementation of the New URS through each state’s relevant agency.

#### B. Standardized Requirements and Thresholds for Registration

Another way for state-level regulators to make charitable solicitation registration less of a burden on public charities that fundraise online is to standardize the requirements and thresholds that trigger registration for out-of-state public

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196. Other scholars, including Lloyd Hitoshi Mayer and Brendan M. Wilson, have proposed a federal agency alternative to the state’s regulation of public charity solicitation. See Mayer & Wilson, *supra* note 9, at 498–99.

In 1999, Duke Law Professor Joel Fleishman recommended the establishment of an independent federal agency with authority to regulate charities. This new U.S. Charities Commission would be modeled after the Federal Trade Commission or the Securities and Exchange Commission and would focus on the procedural—not substantive—functioning of charitable organizations . . . It would . . . have authority to supervise interstate charitable solicitation.

*Id.* Mayer and Wilson also stated that “[t]o the extent that the new institution is given authority to oversee charitable solicitation and other aspects of charity regulation, the new institution will also help to improve coordination among state agencies and lower compliance costs for charities.” *Id.* at 535.

197. See THE CHARLESTON PRINCIPLES: GUIDELINES, *supra* note 101, § IV(C).

198. See *id.* § IV(A).

charities. This standardization can be achieved through state implementation of a narrow set of uniform changes that will help provide public charities that raise funds online with an increased level of certainty when deciding whether to register in a given state. These changes include: (1) implementing the concepts addressed by the original *Charleston Principles* in all states; and (2) clarifying key concepts within *The Charleston Principles* that require more specificity in order to provide uniform standards from state to state.<sup>199</sup>

The main source of existing guidance in standardizing registration requirements for public charities that fundraise online is *The Charleston Principles*.<sup>200</sup> As previously mentioned, *The Charleston Principles* were intended to encourage the states “to use [these] Principles to develop common policies to implement their specific state laws.”<sup>201</sup> The proposed “common policies” would require a public charity to register in a given state when that public charity solicits and receives gifts through a website and the organization also meets one of the following criteria: (1) the website specifically targets individuals physically located in a state as part of its donation solicitation efforts; (2) the public charity receives contributions from within the state through its website on “a repeated and ongoing basis” or on “a substantial basis”; or (3) the public charity sends email messages to residents of the state or contacts them in other ways specifically to promote its website.<sup>202</sup>

It is relatively easy for states to implement the “specifically targets” standard and the direct e-mail standard in a common

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199. This subsection does not propose the standardization of all state-level registration requirements, and explicitly avoids discussing the standardization of registration rules related to in-person activities within a state. While it would be beneficial for public charities to have completely uniform standards, this Article seeks to alleviate the issues faced by public charities registering across the country due to internet-based fundraising activities.

200. See *supra* Section III.A.

201. *Id.*; see also THE CHARLESTON PRINCIPLES: GUIDELINES, *supra* note 101, § I(A).

202. THE CHARLESTON PRINCIPLES: GUIDELINES, *supra* note 101, §§ III(B)(1)(b)–(c).



way.<sup>203</sup> These standards measure criteria that are binary in nature; for example, a public charity has either sent an e-mail to a resident of a state, or it has not. The states should briefly revisit these standards to ensure they are perfectly consistent nationwide. Ultimately, ensuring uniform standards in these areas should be straightforward.

Conversely, a common definition of on “a repeated and ongoing basis” and “a substantial basis” have remained elusive amongst the states.<sup>204</sup> With respect to the “repeated and ongoing basis” requirement, states need to come to a consensus regarding the number of charitable contributions made by state residents that will trigger registration requirements for public charities.<sup>205</sup> The current threshold number of yearly donors that triggers registration sits between twenty-five and one hundred across states.<sup>206</sup> This discrepancy is far too wide. With respect to the “substantial basis” requirement, states must come to a consensus on the dollar amount of total yearly donations that triggers registration. Currently, this dollar amount varies significantly amongst the states.<sup>207</sup>

These discrepancies must be alleviated in order for public charities to have a clear understanding of which states they must register in, and which states do not require such registration. In order to craft and implement uniform standards, it is logical for state-level regulators to meet again through NASCO on the topic of internet fundraising, much like they did in Charleston in 1999.<sup>208</sup> In doing so, regulators could

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203. *But see* Wu, *supra* note 11, at 3 (“Most organizations get stuck on this third prong, [‘repeated and ongoing basis’ and ‘substantial basis,’] because the *Principles* does not define with any specificity the terms *repeated and ongoing* (referring to the number of separate contributions) and *substantial* (referring to the total dollar amount of contributions.”).

204. *See id.*

205. *See* THE CHARLESTON PRINCIPLES: GUIDELINES, *supra* note 101, § III(B)(2)(c).

206. *See* Wu, *supra* note 11 (stating that Mississippi has a donation threshold of twenty-five donations for a public charity to meet its “repeated and ongoing basis” standard, while Tennessee’s threshold is 100 donations).

207. *See* THE CHARLESTON PRINCIPLES: GUIDELINES, *supra* note 101; *see supra* Section III.C.1 (comparing threshold monetary amount which triggers registration requirement among several states).

208. *See* THE CHARLESTON PRINCIPLES: GUIDELINES, *supra* note 101.

increase the likelihood of buy-in from their counterparts in other states while also providing the best opportunity to create standards that are politically acceptable in each state.<sup>209</sup> Such a meeting should be framed as revisiting the first attempt at uniform internet fundraising principles as two decades have passed since *The Charleston Principles* were approved.<sup>210</sup> While many useful concepts have come from the initial set of principles, key clarifications (and universal buy-in amongst the states) are needed to create a truly effective legal framework for governing charitable donation solicitation consistently across the states.

*C. Positive Outcomes and Potential Hurdles of this Regulatory Scheme*

The New URS and the standardization of state-level registration requirements affecting public charities that fundraise online would yield significant positive outcomes for small public charities. First, a New URS that can be submitted to all states requiring charitable solicitation registration significantly reduces the burden placed on public charities by allowing public charities to reduce the amount of time spent researching state law requirements, effort spent on state-specific registration forms and supplements, and money spent on expert help to complete registration forms. With respect to uniform state-level registration requirements and thresholds, public charities will be better able to understand which fundraising actions trigger registration in all states. Equipped with this heightened understanding of registration requirements and thresholds, public charities will have the ability to strategically plan fundraising actions to maximize internet-based fundraising outcomes, while simultaneously ensuring that the public charity meets compliance standards in

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209. This political acceptance is of particular importance as state legislatures or regulatory agencies will need to implement the newly agreed upon standards.

210. See THE CHARLESTON PRINCIPLES: GUIDELINES, *supra* note 101 (noting that *The Charleston Principles* were approved in 2001).

the states in which it does register. In a world where the states better coordinate the registration rules that apply to public charities, these public charities can divert more time, money, and resources to achieving their organization's stated social mission.

Better yet, these changes can be accomplished without hampering each individual state's ability to protect the public against fraudulent charities by ensuring that every public charity is legitimate. In fact, as the burden of regulating public charities continues to increase for the states due to the number of public charities increasing over time, streamlined disclosures and uniform rules can ensure that regulators do not have their resources stretched too thin.<sup>211</sup> Thus, regulators should see improved outcomes as well—creating a “win-win” scenario for all parties involved.

Of course, recent discourse in our nation's political sphere illustrates the difficulty of finding agreement around issues that must pass through a state legislature or state agency.<sup>212</sup> This task becomes even more complicated when states are asked to find common ground amongst themselves amidst today's volatile political climate. Finding common ground regarding registration requirements and implementing those uniform requirements at the state level across the nation will be easier said than done—posing a real challenge that stands in the way of implementing meaningful, positive change within the charitable sector. While this Article does not contemplate moving the regulation of registration requirements to the federal level, such a solution can and should be in play if the

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211. See Mayer & Wilson, *supra* note 9, at 486–87 (“These trends within the charitable sector suggest that regulation of charity governance is a complex problem that deserves careful attention. As the number of charities continues to increase, existing federal and state regulatory resources will continue to be stretched and additional resources—or new approaches to regulation—will be needed to keep pace with the growth of the sector.”).

212. NAT'L CONF. OF STATE LEGISLATURES, STATE LEGISLATIVE POLICYMAKING IN AN AGE OF POLITICAL POLARIZATION 5 (2018), [https://www.ncsl.org/Portals/1/Documents/About\\_State\\_Legislatures/Partisanship\\_030818.pdf](https://www.ncsl.org/Portals/1/Documents/About_State_Legislatures/Partisanship_030818.pdf) (discussing polarization of public and state legislators and difficulty in achieving split-ticket voting).

states continue to utilize registration requirements that result in public charities having to divert funds away from helping the public. For now, the ball remains in the hands of the individual states to make registration less burdensome on legitimate public charities fundraising online.

#### CONCLUSION

This Article has identified a significant problem for under-resourced public charities: the inconsistent regulation of charitable donation solicitation amongst the states. These inconsistent regulations make conducting a successful online fundraising campaign a daunting task for many public charities. Inconsistent regulations force many public charities to use precious time and resources to fill out dozens of state-level registration forms that ask for a wide variety of state-specific disclosures. Due to the varying and complex disclosures requested by each form, the task often requires the assistance of attorneys or accountants to ensure that the organization has correctly disclosed the appropriate information, adding significant financial costs to the registration process.

The current registration system also leaves public charities with a set of flawed options from which to choose. First, public charities can opt for full compliance, placing a significant time burden on the organization's employees and a significant financial burden on the organization. Alternatively, public charities can limit the number of states in which the organization chooses to register, placing limits on the organization's ability to conduct a successful online fundraising campaign.

A solution to this problem requires state-level regulators to revisit *The Charleston Principles*. Although *The Charleston Principles* provide relatively clear regulations for public charities that fundraise online, they have not been widely adopted by the states. This Article has argued that the states should revisit *The Charleston Principles*, clarify the principles that do not provide clear guidance for public charities, and

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universally adopt these revised charitable solicitation registration standards. Additionally, this Article has argued for the adoption of a New URS, which would allow public charities to register to solicit donations in all states, using one form, one payment, and one online portal. By making these simple changes to the way the states regulate public charities, our society can better encourage mission-driven founders to launch public charities that will impact the lives of those in need.

Of course, this Article raises some questions about the solicitation of charitable donations that have not been fully answered. For example, this Article endorses implementing *The Charleston Principles*, with some slight modifications, as the states' uniform regulations. Of course, there may be other uniform regulations that have yet to be created that could also do an effective job of regulating charitable donation solicitation while providing increased clarity to the public charities under regulation. Simply put, there is more than one way to achieve a better regulatory system in this area. Additionally, while this Article has endorsed a New URS to be used by all states, it has not suggested specific disclosures that should be required by this New URS. Each of these questions would be worthy subjects of future research.

Lastly, it is important to remember that the urgent task presented by this Article is the need to begin making meaningful improvements to our current state-level charitable solicitation regulations. This would allow public charities to better use their organizational resources to serve the public. Given this worthy goal, states will hopefully make the adoption of new registration requirements and processes a top priority.