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Memorandum

To: Board of Directors
ACAT Members
From: Best Best & Krieger LLP
Date: December 22, 2020
Re: AB 992: Open Meeting Laws and Social Media

I. Introduction

California public officials could run afoul of the Brown Act if they communicate with legislative members of the same body on social media under the recently enacted Assembly Bill 992. Now, even giving a “thumbs up” to another official’s social media post on a topic within the legislative body’s subject matter jurisdiction could violate the law. AB 992 is the first change to the Brown Act to address public officials’ use of social media and takes effect January 1st.

II. Issues

This memorandum addresses the following questions:

- What are the Brown Act’s rules regarding communications outside of meetings?
- When may a public official communicate with the public or other public official via social media?
- What constitutes a social media platform?

III. Discussion

A. “Series of Communications”

The Brown Act generally requires that a legislative body’s meetings be open and public, including advance notice, posting of the agenda, and accessibility to the public. The Act prohibits a majority of the members of a legislative body from engaging in a “series of communications,” directly or through intermediaries, to “discuss, deliberate, or take action on an item” that is within the legislative body’s subject matter jurisdiction. As you know, both the Board of Directors and ACAT qualify as legislative bodies under the Brown Act and must comply with these requirements.

B. Communications Allowed and Prohibited via Social Media

AB 992, which amends Government Code section 54952.2, clarifies what kind of communications a public official may have via social media and what kind of communications are prohibited. This concerns communications with the public and communications with other public officials.



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1. Communications with the Public

First, AB 992 clarifies that a public official may communicate on social media platforms to answer questions, provide information to the public, or to solicit information from the public regarding a matter within the legislative body's subject matter jurisdiction. However, the latter types of communications are only allowed as long as a majority of the members of the legislative body do not use any social media platform to "discuss among themselves" official business. According to AB 992, "discuss among themselves" includes making posts, commenting and even using digital icons that express reactions to communications (i.e., emojis) made by other members of the legislative body.

2. Communications with Other Public Officials

Second, a single contact between one public official and another normally would not constitute a prohibited serial meeting. However, AB 992's social media prohibitions go further. It prohibits a member of a legislative body from responding "directly to any communication on an Internet-based social media platform regarding a matter that is within the subject matter jurisdiction of the legislative body that is made, posted, or shared by any other member of the legislative body." Now, if one public official posted a comment in response to another public official's social media post about an agency issue, that could be a Brown Act violation, assuming the two serve on the same legislative body.

While this second rule (prohibiting a single member from responding in any way to another member's social media post) arguably swallows the first rule (prohibiting a majority of the legislative body from discussing an issue on social media), AB 992 nonetheless includes both prohibitions. The conclusion to be drawn is that AB 992 essentially prohibits any interaction on a social media platform between members of a legislative body on issues within the body's subject matter jurisdiction.

C. Social Media Platforms

This new law applies to Internet-based social media platforms that are open and accessible to the public. According to the law, "open and accessible to the public" means "that members of the general public have the ability to access and participate, free of charge, in the social media platform without the approval by the social media platform or a person or entity other than the social media platform, including any forum and chatroom, and cannot be blocked from doing so, except when the Internet-based social media platform determines that an individual violated its protocols or rules."

AB 992 encompasses activity on many types of social media platforms, including, but not limited to, Snapchat, Instagram, Facebook, Twitter, blogs, TikTok and Reddit. That means it could affect social media commenting, retweeting, liking, disliking, responding with positive or negative emojis and/or screenshotting (photographing) and reposting.



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IV. Conclusion

AB 922 clarifies the how and when public officials may use social media to communicate with the public and with each other. Public officials may provide or solicit information to or from the public regarding the legislative body's subject matter, but must refrain from engaging in conversations with, or providing responses to, other public officials regarding the same. As explained above, a public official's comment in response to another's post could constitute a Brown Act violation. Please contact us if you would like further information on this new law.

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