The Challenges of Fundraising Regulation in Comparative Context

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Panel Overview:
Charitable fundraising has been severely impacted by the financial crisis, forcing organizations to be ever more creative in their methods, some of which may stretch convention and perhaps existing rules. How fundraising is regulated has long been at the heart of accountability for the nonprofit sector due to the degree of donor trust involved and the lingering effects of highly publicized scandals over the misuse of public funds (Gibelman & Gelman, 2004; Morris, 2005). Given new pressures on fundraising, it is not surprising that there has been a renewed interest internationally on the part of both governments and charitable sectors in developing more effective regulatory frameworks for fundraising.

These new approaches are taking quite different paths in different jurisdictions and can conceptually be categorized as three distinct models: 1) state-led, rule-based regulation; 2) sector-led self-regulation; and 3) mixed models in which government regulations, voluntary codes, sector-led certification, and independent third party watchdogs all have a part and which operate to various degrees as integrated regimes (Breen, 2009; Phillips, 2009). What does it take to enable each model to succeed? In the current environment, is one model more likely to be effective than any other? These are the key research questions addressed in this set of papers.

This panel explores in a comparative context current and emerging approaches to the regulation of charitable fundraising. The presenters, drawn from the United States, Canada, Australia and Ireland provide a range of perspectives on the various models of regulation currently evolving in their respective jurisdictions. These countries have been selected because they encompass each of the three distinct models that are evolving and can, collectively, provide an assessment of the relative merits and limitations of each. The papers begin by setting out contextual information which facilitates deeper analysis of a) the theoretical choices made by jurisdictions and b) the challenges inherent in the implementation of the chosen regulatory approaches. The papers then provide an analysis of the factors that are affecting implementation of these new regimes, and assess their likelihood of being effective.

This panel thereby provides a global platform for the discussion of an essentially generic question – how should we and how do we regulate the solicitation of funds for charitable purposes? In posing this question, the panel examines whether there are common lessons that can be learned from the various approaches currently being undertaken in the jurisdictions examined.

References:


Title: Operating in a Complex Regulatory Environment: Complying with Fundraising Regulation in the United States

Regulation of nonprofit organizations in the United States is diffused among a broad array of actors: a majority of states and quite a number of locales regulate charitable solicitations. The Internal Revenue Service (the federal tax administration) and the Federal Trade Commission have jurisdiction over some fundraising activities. In addition, the American Institute of Certified Public Accountants, through its development of related accounting standards, influences the reporting of fundraising expenses which, when “excessive,” are the concern of both the local and the federal regulators. There are also several private nonprofit “watchdog” agencies which examine the fundraising activities of charities and provide advice or commentary to donors and other interested parties based on internally developed standards.

This paper will outline the roles of the various actors and then concentrate on activities of the officials who regulate charitable solicitations to a greater or lesser extent in three-quarters of the American states.

In 2007, the Washington State Legislature created by statute a Charities Advisory Council to assist the Secretary of State in the administration of the Charitable Solicitations Act and with other dealings with charitable organizations. The author has served for the past two years as chair of this group during the development of significant new regulations implementing provisions of the act. In many respects, Washington’s statute parallels those that are found in other jurisdictions though Washington is one of only a handful of states where a formal structure for consultation with charities, commercial fundraisers, and other interested parties has been put in place.

Examining both the details of the Washington state experience and generalizing about the approach and scope of regulation of fundraising in other jurisdictions, this paper will provide an overview of the policy environment and procedural requirements affecting the fundraising of charities and the commercial contractors who assist in this work. The paper will end with a brief analysis of the challenges that internet fundraising and other recent developments have raised for the current regulatory regime.

References:


Title: Anglo-Irish Perspectives on the Economic and Social Costs of Non-statutory Fundraising Regulatory Regimes.

In 2007, the Irish Government embarked upon a partnership with a nonprofit think-tank, Irish Charity Research Ltd, to survey charitable giving in Ireland and to make recommendations based upon a feasibility study as to how the solicitation of such charitable donations might be regulated in any new legal framework governing charities in Ireland. Through a specially appointed steering group and later on a working group, the nonprofit consulted nationally and internationally before proposing a method of non-statutory fundraising regulation for Ireland. In 2008, the Irish Government accepted the recommendations of the steering group and authorised it to take the project to the next level of implementation: the creation of an implementation group to set about developing fundraising codes.

This paper addresses the challenges that now lie ahead in the development, implementation and enforcement of non-statutory codes of conduct in Ireland. In this regard, particular attention is paid to Great Britain’s recent experience of fundraising self-regulation in the form of the Fundraising Standards Board (FSRB). Established in 2006, the Board has had to contend with lower than anticipated membership numbers, issues over subscription rate costs and the difficulties of policing non-members. Full stakeholder buy-in has not yet occurred in the United Kingdom with Northern Ireland regulators remaining to be convinced of the regulatory model’s value and instead contemplating the possible advantages of adopting (through liaison with the relevant Irish authorities) an all-Ireland approach to charitable fundraising regulation.

With its 5-year initial government funding due to end shortly, the FRSB must not only prove itself to be self-financing and thus sustainable but it also faces the challenge of proving empirically its ability to be an effective fundraising regulator. The stakes in this regard are raised since the Charities Act 2006 gives the British Government a reserve power to regulate fundraising if self-regulation were to fail. The recent identification of successful self-regulation performance indicators following the Home Office’s 2005 Consultation Paper on Self-regulation of Fundraising clarifies the task at hand while simultaneously challenging the FRSB regime to meet these indicators. Taking this experience on board, the paper will explore the potential for the Irish implementation group to lessen the risk of failure by avoiding pitfalls identified in the British case study.

Conscious of the effect of the current recession on charitable giving (in light of recent figures released by NCVO’s Giving UK (2009) and in Ireland in the Report on Charitable Fundraising in an Economic Downturn (2009)), the paper will assess the inherent costs of effective non-statutory regulation and how they are borne. To this end it will examine the interplay of such factors as -- the presence of sectoral goodwill, critical mass in terms of compliance, the potential for effective enforcement and the threat of regulatory capture -- and the extent to which these elements act as true indicators of a successful fundraising regulatory regime.

References:


Centre for Nonprofit Management, TCD, Charitable Fundraising in an Economic Downturn (September 2009)

Dale, Harvey (2005), Study on Models of Self-Regulation in the Nonprofit Sector (New York University).

Home Office, Report on the responses to the consultation on Principles for Assessing the Success of Self-Regulation of Fundraising (February, 2006)

Irish Charities Tax Research, Regulation of fundraising by charities through legislation and codes of practice: final feasibility report (May 2008)


Title: State and Self-Regulation of Fundraising in Canada: A Hybrid Approach or Two Solitudes?

A relative newcomer to the regulation of fundraising, Canada is following a path that is a hybrid of a model of state regulation, as well established in the USA, and the experiment with non-statutory self-regulation, as adopted in the UK and Ireland. Historically, Canadian governments have been reluctant regulators of fundraising: the provinces, which hold the constitutional authority, have been largely uninterested and the federal government, which as the central tax collector is the de facto regulator of charities, has not pushed its jurisdictional boundaries to directly regulate fundraising practices. This changed in 2009 when the Government of Canada established a new Guidance on Fundraising that sets acceptable ratios of fundraising costs to revenues and that identifies the governance systems that a charity is expected to have in place in order to reduce the risk of incurring excessive fundraising costs. It remains to be seen whether the policy will be implemented as ‘soft’ guidance or ‘hard’ rules.

Effective use of the new fundraising policy as guidance will depend in large part on the ability of the tax agency to become a much more ‘responsive’ regulator (Ayers & Braithwaite, 1992; Scott, 2004), working with charities to develop better fundraising practices. The ability to treat the fundraising standards as hard edge rules requires an increased capacity in the agency to monitor and enforce compliance and presumes that its jurisdictional authority is not contested. The involvement of government in either role is made more difficult by a lack of quality information. A 2009 study of fundraising expenses of Canadian charities suggests significant under reporting of fundraising expenses as well as simple errors in calculations on the mandatory tax return (Ayer, Hall & Vodarek, 2009).

At the same time that the federal government has taken a greater interest in monitoring fundraising practices, the third sector itself relaunched a longstanding but under-subscribed voluntary code of ethical financial management and fundraising. This resurrected code is part of a plan by the primary infrastructure organization, Imagine Canada, to implement a more comprehensive, full-fledged set of governance standards with certification, monitoring and potentially sanction by an independent Voluntary Sector Standards Board. This is a bold move for a sector that has not been particularly supportive of infrastructure organizations, already feels over regulated, and does not necessarily see a serious problem with fundraising.

This paper explores these unfolding developments in both government and self-regulation of fundraising in Canada and analyzes the factors that will influence effective implementation. The key question is: what will it take to make both government regulation of fundraising and sector certification of good governance work, and what it will take to make them work in an integrated manner as a coherent regulatory regime? The research is informed theoretically by the literature on responsive regulation (Baldwin & Black, 2008; Jordana & Levi-Faur, 2004), particularly recent research on voluntary codes and certification that have been developed not only in the third sector (e.g. Bothwell, 2000; Sidel, 2005) but are now widely used in other sectors (see Cashore, 2002; Webb, 2004); more specifically, it builds on work on the regulation of fundraising (Breen, 2009; Harrow, 2006; Hopkins, 2009). The empirical portion of the paper is based on interviews with key informants in government, infrastructure organizations, and national charities in Canada, and on recent data on fundraising expenses available through the Canada Revenue Agency.
The analysis assesses the implications of the hybrid approach that is developing in Canada: What happens at the nexus of state and self-regulation of fundraising? Will government involvement create incentives or disincentives for voluntary certification? Will the model evolve into an integrated system in which government-led and sector-led regulation are mutually reinforcing, or will they operate as two solitudes? Given that it is still early days in the implementation of both mechanisms, the paper is to some extent necessarily speculative, but by comparing the Canadian experience to that of other jurisdictions, it attempts to draw conclusions on the relative merits of different approaches to the regulation of fundraising.

References:


Webb, Kernaghan. 2004. “Understanding the Voluntary Codes Phenomenon,” In Kernaghan Webb, ed., Voluntary Codes: Private Governance, the Public Interest and Innovation. Ottawa: CRUISE, School of Public Policy and Administration, Carleton University, pp. 3-34. Available at:

http://www2.carleton.ca/sppa/research/publications/index.php
Abstract Paper 4:

Title: What is the theory behind proposals for reform of Australian fundraising?

Australia is in the midst of a significant number of regulatory reviews of nonprofit enterprise that will all have reported to government by early 2010. Nearly all of these reports will touch on fundraising through tax concessions, regulatory frameworks, new entity forms and accounting regulations and one is devoted to assessing the feasibility of a national fundraising regime. The inquiries consist of two Council of Australian Governments (COAG).

References (Council of Australian Governments, 2006, 2008); a Productivity Commission study (Productivity Commission, 2009); a Senate Economics Committee report (Australia, Senate Standing Committee on Economics, 2008); three Treasury and one Tax Office Inquiries (reporting by companies limited by guarantee (Commonwealth Treasury, 2007), regulation of foundations (Australia, Treasury, 2008a), tax reform (Australia, Treasury, 2008b), and charity counter-terrorism funding (Australian Taxation Office, 2009)); a review of nonprofit accounting disclosures by the Australian Accounting Standards Board (AASB) (Australian Accounting Standards Board, 2009); three state-based nonprofit incorporated association reform initiatives; a red tape reduction review (Victoria, State Services Authority, 2007); and one state whole-of-sector review (Victoria, Stronger Community Organisations Project Steering Committee, 2007).

The paper will analyse the recommendations of these inquiries in relation to fundraising regulation, paying particular attention to the underlying assumptions and theories supporting such recommendations. The relationship of these recommendations to Australia’s two fundraising self-regulatory codes will be examined.

Over the last four years the Fundraising Institute Australia (FIA) has developed an extensive self-regulatory code for its professional members (Fundraising Institute Australia, 2008). The Australian Council for International Development (ACFID) has had a code of conduct in place covering nearly all Australian overseas aid agencies for a decade (Australian Council for International Development, 2004). It has recently reviewed the code extensively, for its functionality and suitability for the future. A Senate Economics Committee report (Australia, Senate Standing Committee on Economics, 2008, p. 2) has already recommended that:

“The voluntary codes of conduct developed by ACFID and FIA respectively should be considered by the Regulator when implementing its own code of conduct.”

References


1 COAG’s Business Regulation and Competition Working Group is implementing efforts to standardise fundraising and to introduce a standard chart of accounts for nonprofit organisations.


2 One of the terms of reference is to 'identify unnecessary burdens or impediments to the efficient operation of community organisations generally, including unnecessary or ineffective regulatory requirement s'. 3 For Victoria, amendments to the Associations Incorporation Act 1981 (Vic) came into effect on 8 April 2009. See at http://www.consumer.vic.gov.au; for New South Wales, see at http://www.fairtrading.nsw.gov.au/Cooperatives_and_associations/Associations/Associations_legislation/Changes_to_associations_legislation.html, and the new Associations Incorporation Act 2009 (NSW); for Western Australia, see at http://www.commerce.wa.gov.au/ConsumerProtection/Content/Business/Associations/Act_Review/index.htm