REGULATING CHARITABLE SOLICITATION PRACTICES
– THE SEARCH FOR A HYBRID SOLUTION

OONAGH B. BREEN*

INTRODUCTION

The trend towards better regulation in recent years in many jurisdictions has led to a reassessment of the goals that policymakers seek to achieve by regulation and the capacity of different models of governance to achieve those stated policy objectives.1 Two points emerge from this reassessment: regulation that is effective tends to have clear and attainable policy goals; and successful regulation occurs more often when there is a correlation between the practical outcomes of a particular regulatory model and its intended policy goals.2 Although one cannot always guarantee in advance the practical effectiveness of any form of regulation, a focus on the underlying problems that regulation seeks to resolve and the development of a model designed to tackle those issues in a proportionate manner should lead to better policy implementation in the long run.

This paper applies that approach to the area of charitable fundraising. This paper draws on four existing fundraising regulatory models and examines whether there is a mismatch between the stated policy goals that these models set out to achieve and the practical consequences that flow from their implementation. In light of this review, the paper proposes the creation of a new hybrid model, designed to resolve some of the identified policy/practice inconsistencies, before testing the potential for the adoption of this conceptual model in Ireland, a country currently engaged in the reform of its charitable solicitation regulatory regime. The absence of any major statutory revisions to the charity fundraising regulatory regime in Ireland in the past 45 years results

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in the Irish legal framework providing a useful blank canvas – one unencumbered
by incremental ad hoc statutory revisions – against which the merits of a new
fundraising regulatory model can be more critically evaluated.

FUNDRAISING REGULATION – FOUR CONCEPTUAL MODELS

A policymaker who seeks to regulate charitable fundraising may have several
different purposes in mind: she may wish to eliminate fraud, whether of the
egregious ‘bogus fundraising'/charity embezzlement type or of the perhaps less
egregious breach of statute type; she may wish to reduce charitable inefficiency,
thereby ensuring that the greatest percentage of the fundraising proceeds is
applied to the charitable purpose; or she may simply wish to better inform donors
as to how their charitable Euro is being spent, thereby empowering donors to
choose wisely amongst their charitable causes and effectively to sanction charities
by withholding donations when those charities fall short of the expected standard.

With these policy goals in mind, a policymaker is presented with a number of
moments in time at which to influence fundraising practice. One might identify,
for instance, the build-up to solicitation (associated with any pre-clearance or
authorisation requirements necessary to fundraise), the moment of solicitation
itself, the aftermath of solicitation (namely, the process of transferring the
money from the fundraiser to the charity), and finally, the actual application of
charitable proceeds to the charitable cause in question. Of these four moments,
the last in time – the application of charitable proceeds – raises issues that go
beyond fundraising per se and can better be addressed within the broader context
of charity regulation and so will be excluded from the scope of the current inquiry.
Thus, we are left with three interrelated policy goals (namely, avoidance of fraud,
avoidance of inefficiency, and empowerment of donors) and three moments in the
fundraising process (the before, during and after solicitation) during which we
can give effect to these objectives. With this information to hand, it is therefore
possible to begin to assess the effectiveness of existing models of fundraising
regulation.

The four models discussed in this paper have been conceived by the author
and are drawn from regulatory practices prevalent in the past, currently in force
or proposed for use in the future in various jurisdictions. The models are not
offered as fully representative of the regulatory practice in any given jurisdiction.
Rather, the models are conceptual in nature with each one pared down to its
most basic elements that best typify the type of policy approach for which it
stands. In this regard, it may be possible to identify the concurrent operation
of more than one possible regulatory model in some jurisdictions. The models,
the characteristic features of which are listed in Table 1, are respectively: (A)
The Statutory Cap Model; (B) The Disclosure upon Receipt Model; (C) The
Central Regulator Model; and (D) The Self-Regulation Model, each of which
will be discussed in turn below.
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<td>Setting of a prescribed percentage that must go to the charitable cause or prescription</td>
<td>Inflexibility of cap can limit legitimate fundraising drives by charities</td>
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<td>B. Disclosure Upon Receipt</td>
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<td>Creation of codes of conduct dependent upon charity sector uptake and compliance</td>
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Model A – The Statutory Cap

The Statutory Cap Model imposes an immutable quota on the amount of fundraising proceeds that may be diverted from the charitable cause. The focus of this model is on the avoidance of excessive non-charitable expenditure and the statutory cap alternates between setting a prescribed percentage that must go to the charitable cause and a stated percentage limiting the promotional costs of the fundraising venture. Since the state sets the percentages, the state controls what constitutes ‘reasonable’ expenditure. The rule is prophylactic and takes effect in the aftermath of solicitation by reviewing the costs attributable to the fundraising venture. Expenditure above the bar may result in the future refusal of a fundraising permit. The views of the charity and the donor as to an organisation’s fundraising needs and acceptable fundraising practice are often irrelevant in this model. The policy goals to the fore are the avoidance of fraud (with fraud automatically being associated with high levels of fundraising costs) and the promotion of charitable efficiency (flowing from the idea that there cannot be any justification for a charity to spend more than the prescribed statutory threshold) (Fremont-Smith, 2004). Variations on this model can be found currently in force in Ireland, New South Wales, and Canada. Up until the late 1980s this type of Statutory Cap Model was also popular with State legislatures in the US until the US Supreme Court held that its use violated charities’ First Amendment rights to freedom of expression.

Model B – Disclosure upon Receipt

In contrast, the second model does not seek to set absolute limits on acceptable fundraising costs. Instead, the Disclosure upon Receipt Model requires charities to disclose their programme spending ratios or fundraising efficiency ratios to donors at the moment of solicitation, thereby empowering donors to decide whether the level of charitable administrative/fundraising expenditure respectively is acceptable. By disclosing these costs to donors at the moment of solicitation a donor unhappy with the efficiency of the charity may decide not to contribute to the campaign. This model is predicated on the existence of a proactive public with an informed view on the real costs of running a charity and a willingness to police charitable fundraising campaigns. To work as intended the model must facilitate the communication of accurate information regarding charity running costs to donors in tandem with the charity’s expression of its mission statement and its solicitation pitch. Examples of this regulatory model can be found in England and Wales and formerly in a number of states in the US before this form of regulation fell foul of First Amendment rights.

The main advantages of the Statutory Cap Model (Model A) and the Disclosure upon Receipt Model (Model B) lie in their blunt approach to charitable solicitation. The Statutory Cap Model establishes an absolute threshold for non-charitable expenditure in the context of fundraising, forcing charities to either meet the benchmark or risk sanction. The Disclosure upon Receipt Model is more...
subtle in its approach. Although this disclosure model does not prescribe a fixed percentage expenditure limit, its success depends on donors’ (i.e., the market’s) assessment of and reaction to ‘reasonable’ non-charitable expenditure.

The idea that one can draw such a clear delineation between ‘good’ and ‘bad’ fundraising costs is the biggest disadvantage of these models. In the words of Lammers, ‘[c]hoosing which charity to support based only on financial ratios is a little like choosing a restaurant based on how much it spends on advertising and marketing versus food’ (Lammers, 2003, p.1). There may be neutral explanations for high fundraising costs, such as new fundraising campaigns with large upfront set-up costs, or unpopular charitable causes that need to employ professional fundraisers to carry out solicitation in the absence of volunteer support. There may also be contextual explanations: the size of the organisation and how established it is in the community may influence the fundraising efficiency ratio (Nonprofit Overhead Cost Project, 2004; and Hyndman and McKillop, 1999).

The use of a control percentage in the Statutory Cap Model does not cater to these realities. Although the Disclosure upon Receipt Model is more open than the Statutory Cap Model to a charity explaining the rationale for its chosen costs level (and is, in fact, predicated on charities doing exactly that), in practice charities want to convey a convenient sound byte regarding their costs while devoting most of those valuable pre-solicitation moments to engaging the donor (and his wallet) in the particular charitable purpose at hand.

An associated problem with both of these models can be their failure to distinguish consistently between associated fundraising costs on the one hand and costs more generally associated with administrative overheads, on the other, particularly in the calculation of financial ratios. When the policy goal is the avoidance of charity inefficiency, the difference between these two figures is materially significant and the blurring of the boundary between these two costs undermines the ratios subsequently produced. In a recent paper, Jacobs and Marudas found that fundraising inefficiency (fundraising expenses/total expenses) does have a significant negative effect on donations whereas administrative inefficiency (administrative expenses/total expenses) does not (Jacobs and Marudas, 2007). Although this finding is contestable, researchers are in agreement that administrative and fundraising expenses have different effects on donations (Greenlee and Brown, 1999).

Even when calculation of the single percentage figure to convey what constitutes ‘reasonable’ expenditure – central to both models – is focused purely on fundraising overheads as opposed to general administrative costs there are strong economic arguments against the use of such a figure for determining charitable efficiency. One school of economic thought has challenged the reliability of using an average fundraising cost percentage (derived by dividing total fundraising expenditure by total donations) as a measure of charitable efficiency (Heeman, 1979; Steinberg, 1986; and Rooney 1999). Given the distinction between fundraising efficiency (i.e., minimising the average cost per Euro raised) and fundraising effectiveness (i.e., maximising the net between the total gifts...
received less total fundraising expenses) Rooney posits that it is preferable to spend €300,000 to raise €3 million (at a rate of 10 percent fundraising cost) than to spend €160,000 raising €2 million (8 percent fundraising cost) since despite the higher fundraising ratio the net enhancement of the former campaign exceeds the latter by a total of €860,000.

To this end, Steinberg has argued that rational donors should disregard average fundraising cost percentages as meaningless and has urged donors instead to focus on a more accurate test of marginal productivity (viewing optimal fundraising as occurring when the level of fundraising expenditure is such that the marginal costs of the fund-drive are equal to the marginal benefits gained by the charity). In this latter instance, it is only when each additional €1 spent on fundraising expenditure results in a donative return of less than €1 due to market saturation that a concern over fundraising expenditure should arise. Until this optimal (and shifting) point is reached, however, regardless of the level of fundraising costs, donors should ignore average costs and continue to donate.

If Steinberg is right it follows that the use of an average fundraising cost percentage as either an essential element to determine allowable expenditure in the Statutory Cap Model or as a rule of thumb for determining reasonable expenditure in the Disclosure upon Receipt Model will be highly flawed and will result in donors making inferior decisions regarding the allocation of their resources amongst charities. Quite apart from whether donors should consider fundraising cost levels (Sargeant et al., 2008), it remains an open question as to whether they actually do (Tinkelman and Kamini, 2007; and Steinberg, 1991).

**Model C – Disclosure to Central Regulator**

A third regulatory model, the Central Regulator Model, attempts to deal with some of the shortcomings found in the Statutory Cap and Disclosure upon Receipt Models, by changing the timing of regulatory intervention from the moment of solicitation to the aftermath of solicitation. The Central Regulator Model requires charitable organisations to file information on their completed fundraising activities with a central regulator. This information can then be used by the regulator, on behalf of the state – or by interested donors or the media if the files are made publicly available – to monitor fundraising practices in the broader context of a charity’s financial activities.

This model moves away from a prophylactic approach to fundraising regulation in favour of a disclosure model so it bears similarities with the Disclosure upon Receipt Model in this respect. However, the advantage of a Central Regulator Model over the latter is that more comprehensive and meaningful disclosure can occur in a report to a regulator than can occur in the context of a sound byte disclaimer to a donor at the point of solicitation. A charity under Model C is thus facilitated in contextualising both fundraising and other administrative expenses within the broader picture of its overall finances. The provision of
more detailed information – at least theoretically – enables those with access to these figures to glean a more accurate account of a charity’s efficiency and probity and to interrogate those numbers in a more meaningful fashion. An informed use of the reports generated under the Central Regulator Model might trigger fraud investigations on the part of the State, alert proactive donors (not to mention investigative journalists) to charities’ performance in a given year and enable charities to engage in peer review assessment of the fundraising activities of charitable counterparts. Thus, the Central Regulator Model avoids the shortcomings of an imposed percentage threshold (unlike the Statutory Cap Model) while still giving charities real control over the actual level of non-charitable expenditure (unlike the Disclosure upon Receipt Model).

Yet, the Central Regulator Model is not problem-free. First, from a donor’s perspective, it lacks the immediacy of the other models. Given the high level of prompted giving in some countries, such as Ireland, a regulatory model that depends on ex-post disclosure to a Regulator comes too late in the day to empower donors in their charitable giving choices. An ex-post disclosure regime might therefore work better in a jurisdiction in which planned giving is the norm. Second, the more comprehensive the information the reports provide the more difficult it may be to convey objectively to donors the standing of a particular charity. Even when a national standard accounting procedure (such as GAAP or SORP) exists, there remains scope for the same figures to be represented differently in two comparable charities’ books of account either due to a charity’s strategic manipulation of its programme/fundraising expenses ratios or simply as a result of unintentional misclassification of expenses by that body (Krishnan et al., 2006; Jones and Roberts, 2006; and Keating et al., 2008). Moreover, studies that have tested for donor reliance on reported fundraising expenditure in making charitable donation decisions found that donors rated charitable mission and actual achievement more highly than fundraising costs as controlling influences on their benevolence (Khumwala and Gordon, 1997). If proactive donors (assuming a lack of passivity by the donating public), or (a well-resourced) Regulator or an interested media is prepared to scrutinize charity’s accounts, the Central Regulator Model could provide the breadth of information necessary to construct comparable and reliable figures to gauge charitable efficiency. However, in the absence of interested and competent third parties or a well-resourced Regulator, this type of regulation imposes compliance burdens on charities without tangible regulatory benefits.

The UK’s Statement of Recommended Practice (SORP 2005) and IRS Form 990 in the US provide practical examples of Model C in action. Both SORP and Form 990 require charities to allocate their expenses under the separate headings of programmatic, fundraising and administrative expenses. Notwithstanding Form 990’s guidance on such cost allocation in the United States, serious doubts exist there as to the accuracy of the expense data provided in charity returns, leading some to argue that the returns are not reliable (Keating and Frumkin, 2003; and US General Accounting Office, 2002). In the face of
anecdotal evidence that 50 percent of US nonprofits which receive donations report zero fundraising expenses, Krishnan’s recent empirical study supports the notion that US nonprofits inappropriately and sometimes intentionally misstate their relative proportion of expenses under the various headings, at times with managerial incentive to bolster further donations (Krishnan et al., 2006). Likewise, Jones and Roberts provide evidence that US charities manipulate the allocation of joint costs in their reports in order to manage their programme ratios (Jones and Roberts, 2006). In the UK, although SORP 2005 has brought greater clarity than previous SORP iterations (in 1996 and 2000, respectively) to the issues of expense allocation, problems still remain that would suggest the US experience of charities’ management of expense allocation cannot be ruled out in the UK either.

Model D – Self-Regulation and Codes of Conduct

The final model, the Self-Regulation Model, moves away from statutory regulation in favour of self-regulation of fundraising practices by the charity sector itself. The argument runs that in an area such as charity with so many diverse organisations, a uniform (and necessarily statutory) approach to regulation is neither appropriate nor workable. Rather, a more proportionate response is to draw upon the charity sector’s expertise to create professional codes of conduct to govern fundraising behaviour. Such codes offer greater flexibility than their legislative counterparts and given the importance of reputation to the charity sector peer pressure from organisations creates an incentive for compliance. Codes of conduct offer a mechanism for dissatisfied donors to have complaints against charities addressed while traditionally providing charities with a role in the adjudicative process. Such self-regulation takes a number of forms in the charity sector. There are professional fundraising associations’ voluntary codes of conduct for members (Fundraising Institute of Australia, 2006a and 2006b; and Giving USA, 2007). There are independent certification programmes that recognise charities meeting their benchmarks. There are also bodies that combine the process of certification with the role of training charities to reach those goals. Finally, there are nonprofits that seek to encourage voluntary compliance with existing codes of conduct developed by other institutes.

The downside of self-regulatory regimes in general relates to compliance and enforcement issues; issues that are necessarily key to the success of any regulatory model. ‘Compliance’ can be understood in two senses – compelled compliance and voluntary compliance. Compelled compliance refers to compliance as a result either of private industry sanctions or because of the force of the law behind statutory regulation. Voluntary compliance, on the other hand, flows from adherence to a code of practice that depends on the goodwill of adherents for its effectiveness. Thus, whereas the Statutory Cap Model and the Central Regulator Model traditionally engage in compelled compliance, self-regulation is more readily identified with voluntary compliance mechanisms.
Self-regulation is at its most effective when an agreed set of rules applies uniformly across an industry and can be enforced against all participants in that sector. Given the diversity – both in terms of size and nature – of the organisations that make up the charity ‘sector’ devising rules that are acceptable to all organisations is challenging. In the absence of a shared sectoral ownership of the rules, it is difficult to achieve a high degree of compliance with such non-statutory regulatory codes. Generally, codes are enforceable only against those members who have signed up to them, thus leaving a large proportion of sector players (i.e., non-members) unregulated. In many cases, absent voluntary compliance with the codes by those charities that sign up, there is little evidence of successful compelled compliance occurring. Lack of either effective sanctions for breach or willingness to enforce those sanctions against peers has resulted in the failure of a number of self-regulatory regimes.

This situation is equally true in the context of charitable fundraising. None of the jurisdictions examined rely solely on a self-regulatory regime to ensure good fundraising practices. Rather codes of conduct operate alongside existing statutory regulations governing fundraising activities, normally with pre-solicitation statutory requirements followed by self-regulatory solicitation requirements. Low levels of take-up hampers enforcement with all bodies recognising their lack of competence over non-members that do not follow the code’s principles.

THE SHORTFALLS OF THE STYLISED MODELS

Thus, as these four stylised models stand none is sufficient on its own to effectively regulate charitable fundraising. The four models focus on different moments in the solicitation process: the Statutory Cap Model (A) and the Central Regulator Model (C) operate in the aftermath of the solicitation but their effect, if any, is subsequently felt in the build up to future solicitations; the Disclosure upon Receipt Model (B) is concerned solely with the moment of solicitation itself whereas the Self-Regulation Model (D) hovers across all of those moments in time though usually being to the fore at the moment of solicitation, like the Disclosure upon Receipt Model.

The models also depend upon a single stakeholder as enforcer: With the Statutory Cap and Central Regulator Models, the state is the main enforcer whereas the donating public plays this role with regard to the Disclosure upon Receipt Model (and perhaps potentially with regard to Central Regulation). By contrast, the Self-Regulation Model focuses on charities as the main enforcer and regulator, relying heavily on peer pressure to achieve compliance. The self-regulation regime works only if charities subscribe to the code since a donor cannot register a complaint against a non-member.

Finally, the policy goals of these models also vary. The predominant emphasis in the Statutory Cap Model is on the avoidance of fraud. It is submitted that
the Statutory Cap Model fails to achieve this objective. The statutory setting of a fundraising costs threshold neither prevents funders spending less than the prescribed fund from being dishonest nor correctly identifies those funders spending more as engaging in fraud. The Disclosure upon Receipt Model, for its part, prides itself on empowering donors to choose a well-run charity. Again, it is arguable that the model does not achieve its objective for three reasons. First, donors would only be so empowered if the provision of a single percentage figure or ratio at the point of solicitation was adequate to convey an accurate picture of a charity’s fundraising management. In the absence of greater disclosure as to how this percentage figure is calculated by an individual charity the value of this figure as a public benchmark of good governance is lessened. Second, even in a situation in which one charity is open about the method used to calculate its fundraising ratios (i.e., whether average productivity or marginal productivity ratios are used), this figure might still incorrectly identify that charity as inefficient when compared to rival charities if, for example, the first charity was at the start of a large fundraising campaign (and therefore incurring large up front costs) or if the charity required the assistance of professional fundraisers due to a lack of volunteers (Bennet and Savani, 2003).20 Third, given the setting – a one-minute conversation at the moment of solicitation – there is an abiding temptation for a fundraiser to simplify the fundraising costs information down to a single (low) percentage that is plausible outside the broader context of a charity’s financial reports, which upon greater scrutiny might reveal a less flattering view of the charity’s actual ratio of expenditure to funds raised. The Central Regulator Model purports to cover all three policy concerns of fraud, charitable inefficiency and empowerment of donors. Its effectiveness as a model of fundraising regulation, however, will be limited greatly in any jurisdiction in which there is an absence of interested parties (whether caused by lack of resources or expertise in accountancy) to make sense of the filings. Moreover, even if interested parties exist, the lack of a standard accounting procedure or the ability to manipulate the classification of expenses will render it difficult to compare charity returns. Finally, the Self-Regulation Model does not claim to tackle fraud or inefficiency. Although complaint mechanisms exist in self-regulation frameworks, it is quite common for these models to declare that their aim is to emphasise ethical behaviour over punishment (Association of Fundraising Professionals, 2004). However, in the absence of effective sanctions it is difficult to promote ethical action without at least the threat of effective compelled compliance (Dale, 2005).

DEVELOPING A NEW REGULATORY MODEL FOR CHARITABLE FUNDRAISING

All of the preceding models share common problems that make them less than effective. Each one leaves the responsibility for enforcement entirely to one
group, whether it is the State, the donating public or charities themselves. The models also tend to focus on one moment in time during the life cycle of solicitation. If responsibility can be diversified between all three stakeholder groups so that our pressure points in time – namely, the build-up to solicitation, solicitation itself and the aftermath of solicitation – can be policed evenly, the result should be better enforcement with a correspondingly lower level of regulatory requirements at each stage of the process. Creating a triumvirate of scrutiny between state, sector and public correspondingly lessens the burden of enforcement on all. Equally, by devising a regime that covers the entire lifecycle of solicitation more effective oversight should be possible thereby providing greater opportunities to achieve our stated policy goals.

The Hybrid Model – The Propagation of New Fundraising Regulatory Model

To cover the lifecycle of charitable solicitation more comprehensively, a new regulatory model would need to be sensitive to the different needs of stakeholders at different moments of time in the charity solicitation process. None of the models reviewed in this paper provide perfect solutions in their own right to the challenges of fundraising regulation but each have attractive features that should be salvaged or recycled for use in any new proposed model. The most attractive feature of the Statutory Bar Model is its simplicity: a black and white test regarding fundraising expenditure. Unfortunately this model’s most attractive feature is also its biggest disadvantage – the notion that a fixed percentage figure can do justice to all charitable solicitation campaigns is misconceived. Although the Disclosure upon Receipt Model also depends upon the reliability of a single percentage figure in controlling fundraising expenditure – which this paper has argued is misplaced – this model does have other attractive features such as its engagement with donors and the immediacy of the information conveyed.

The weakness of incomprehensiveness in both the first two models is addressed by the Central Regulatory Model. This model, as discussed above, provides fuller financial data to speak to a charity’s activities seeking thereby to empower donors and lessen the possibilities for both fraud and charitable inefficiency. Technically, this model should be the model of choice for fundraising regulation. And yet, practically, the continuing scope for manipulation of expense figures, the lack of immediacy at the moment of solicitation (particularly in prompted spontaneous giving climates) and the ongoing need for stakeholders to proactively police and interrogate this data for effective regulation to occur reduce this model’s attractiveness as an exclusive regulatory model. Finally, the attraction of the Self-Regulation Model is the buy-in of the charity sector. Peer involvement in decisions on applicable standards, peer pressure to abide thereto and flexibility outside of a statutory regime to adapt standards as the fundraising climate changes are all major plusses of this model. The drawback, as is often the case with self-regulation regimes, is the lack of ability to guarantee coverage across a sector and an inability to compel compliance even amongst subscribing members.
If these features and shortfalls are taken to heart, it is possible in light of these lessons to devise a new regulatory model – a Hybrid Model – the characteristics of which mirror the best features of earlier models in a structure designed to avoid their pitfalls. Such a model, if it were to succeed, would need to engage the State, the public and the charity sector in the policing of fundraising. It would also need to spread its supervisory mantle over all three moments of fundraising practice from pre- to post-solicitation. The main features of the proposed model are listed in Table 2.

The Hybrid Model, as its name implies, draws inspiration from all four models but predominantly from the Central Regulator and Self-Regulation models. The combination and sequencing of regulatory requirements makes the Hybrid Model more sensitive to the life-cycle of fundraising initiatives. By spreading responsibility for monitoring over multiple stakeholders within an integrated framework, there is a more even distribution of the policing burden. Moreover, the sequencing of checkpoints on fundraising activity lessens the risk that a stakeholder will assume another is entirely responsible for policing fundraising activity. To this extent, the success of the Hybrid Model is predicated upon adoption of the entire package.

In the sequencing of its requirements and the positive feedback between its various elements, the model is designed to avoid the problems associated with multiple accountabilities (through the integrated nature of the model), and with over- and under-accounting (Edwards and Hulme, 1995). For instance, the Hybrid Model seeks to overcome the difficulties normally associated with self-regulation by guaranteeing charities a pivotal role in the design of the codes but lessening their involvement in their subsequent enforcement – tackling directly the issue of weak accountability.

The Hybrid Model envisages the submission of annual reports on fundraising activities to a central regulator in tandem with other financial and performance information. In contrast to pure Central Regulator Models, proof of such submission in turn becomes a prerequisite for obtaining subsequent fundraising permits from the State thereby providing a positive feedback mechanism at both the build-up to solicitation (in seeking a permit) and the aftermath of solicitation (in accounting for fundraising proceeds).

The advantage of this mechanism is that it encourages fundraising charities’ timely submission of annual accounts and it induces the state to be more accountable and responsive. OECD research has considered carefully the policy criteria surrounding effective licensing to the effect that (a) licences should be required only if there is a clear risk to the public associated with the activity in question if it is unlicensed; (b) renewal should only be required where there is substantial need to verify continued competence; (c) permit qualification criteria should be directly related to the ability to competently perform the licensed task; and (d) procedural requirements should be restricted to the minimum necessary (OECD, 2003). If fundraising permits are required to protect the public (whether it be from fraud or charitable inefficiency) evidence of probity in past fundraising
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<th>Origins</th>
<th>Twist</th>
<th>Moment of Impact</th>
<th>Affected Stakeholder</th>
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<td>Statutory Bar Model</td>
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<td>Avoidance of Fraud and Avoidance of Inefficiency</td>
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<tr>
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<td>Moment of solicitation</td>
<td>Donors and Charities</td>
<td>Avoidance of Fraud and Avoidance of Inefficiency and Donor Empowerment</td>
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<tr>
<td>Independent Complaints Procedure</td>
<td>New</td>
<td>Although the standards are developed by charities they are enforced by an independent body that does not have a charity stakeholder majority</td>
<td>Post-solicitation or if ongoing campaign potential for impact during solicitation</td>
<td>Donors and Charities and State</td>
<td>Donor Empowerment</td>
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<td>Features</td>
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<td>Submission of Accounts to Central Regulator</td>
<td>Central Disclosure Model</td>
<td>Timely submission necessary in order not to prejudice future fundraising activities</td>
<td>Post-solicitation but also an effect on future pre-solicitation since proof of submission necessary for permit application</td>
<td>State and Donors</td>
<td>Avoidance of Fraud, Avoidance of Inefficiency and Donor Empowerment</td>
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<tr>
<td>Application of Codes as Benchmark by Other Regulators</td>
<td>New</td>
<td>In cases of breach, application of Codes of Conduct as a Benchmark of Good Practice has the potential to affect all charities and not just those who sign up to the Codes</td>
<td>Post-solicitation but with an incentive effect on all charities pre-solicitation</td>
<td>Statutory Regulators – Police, Charity Regulator, Public Donors</td>
<td>Avoidance of Egregious Behaviour bordering on Fraud</td>
</tr>
</tbody>
</table>
endeavours based on reported financial information would seem an appropriate, even minimal, licensing criterion.

The composite nature of the Hybrid Model is further evidenced by its proactive engagement of the charity sector in monitoring fundraising practices (at the moment of solicitation). The Hybrid Model uses codes of best practice, designed with substantial charity sector input, to police fundraising activities. In this way, the practical involvement of charities in the design of regulatory practices is more likely to result in the creation of functional and proportionate standards. Unlike pure Self-Regulation Models, the Hybrid Model makes a committee independent of the charity sector and fundraising professional representative bodies responsible for enforcement of these codes, thereby reducing the fear of regulatory capture (Adams et al., 2007).

To further combat the negative features of a purely self-regulatory regime, the influence of the Hybrid Model’s codes of conduct are designed to extend beyond those charitable organisations that sign up to them. Vis-à-vis non-signatory charities, the codes provide a benchmark against which other regulatory agencies (whether the Charity regulator, the permit granter, the police or perhaps even private funders) can judge the conduct of non-member charity fundraisers when responding to public complaints or carrying out own-initiative investigations. Although non-members would be free to conduct their fundraising campaigns in accordance with their own standards any subsequent complaints arising before a regulatory agency regarding the running of their fundraising campaigns would be judged against the public benchmark of the codes in determining whether the charity’s conduct fell short of the measure expected.

To work effectively the Hybrid Model is dependent on the presence of peer pressure amongst charitable organisations and fundraisers to engage in the development of the code and comply with its terms. The source of such peer pressure would arise, most likely from public awareness of the code(s) (perhaps through some highly visible form of accreditation such as an identifiable kite-mark) and consequent public demand for their widespread adoption.21 The Hybrid Model’s success is also predicated on the chosen enforcement body (whether in the form of a state agent, such as the Charity Regulator, or preferably through state support for an independent monitoring committee) enforcing the codes in an effective and transparent fashion. From a central reporting perspective, the model requires sufficient investment in the central system to ensure that reporting requirements are clear and proportional; that the process of filing returns is straightforward; and that the system for accessing and interpreting the reported figures is user-friendly. A Hybrid Model, consisting of charity sector-devised practice guidelines that are enforced independently of the charity sector and supplemented by a central state financial reporting and fundraising permit regime, thereby provides an interesting twist to the traditional models considered earlier.

One possible drawback from the state’s perspective is that this model would offer no financial savings for the state because the regulator or some
state-supported body would bear the costs of compelling compliance. Indeed, if this model were to be implemented it is imaginable that the state would want some say in the code’s standards, particularly if the state was funding oversight and monitoring of it. This suggested state involvement in the enforcement of the codes (necessary to overcome compliance and enforcement problems) could dilute the voluntary nature of the codes and might introduce a fear that the Hybrid Model is an unwelcome encroachment upon the independence of charities to carry out their charitable mission (Sidel, 2005).

THE HYBRID MODEL AND ITS POTENTIAL USE IN IRELAND: CURRENT FUNDRAISING REGULATION

Since a model can be judged best by practical application the final section of this paper considers the potential use of a Hybrid Model in Ireland, a country currently revising its statutory regulation of charities. Ireland’s primary charity legislation dates from 1961 with its main fundraising regulation legislation enacted in 1962. Given the passage of time and the lack of statutory revision, many of the problems experienced in other jurisdictions with regards to ineffective regulation are writ large in Ireland with regard to charity law.

Fundraising, whether for charitable or non-charitable purposes, is regulated in Ireland by the Gaming and Lotteries Acts 1956–86 and the Street and House to House Collections Act 1962. Under the Gaming and Lotteries Act, District Courts may give licences for up to a year for periodical lotteries, if they are for some charitable or philanthropic purpose(s). The promoter may make no personal profit and the total value of the prizes on any occasion may be not more than €20,000, and, if more than one lottery is held in any week, the total value of the prizes for the week may be not more than €20,000. There is also a statutory cap on costs: no more than 40 percent of the gross proceeds can be spent on promotional costs including commissions. Regulation of charitable lotteries thus follows a Statutory Cap Model approach in Ireland with all the attending disadvantages.

Aside from lotteries, the main fundraising regulation is found in the Street and House to House Collections Act, 1962. As its name suggests, this Act dates from an era when fundraising primarily consisted of door-to-door collections in aid of an organisation or street flag days. Thus, the statute predates modern methods of charitable solicitation most of which, as we will see, fall outside the Act’s ambit. According to the Act, a fundraiser holding a ‘collection’ in ‘a public place’ must obtain a permit from the Garda Chief Superintendent (that is, of the Irish police force) for the locality where the collection is to take place. It is an offence for anyone to be involved in an unauthorised collection. The Act provides limited grounds for Garda refusal of a permit. Such reasons include if the collection would be prejudicial to public order, if the proceeds would benefit
an unlawful organisation or encourage unlawful acts, or if the permit applicant or collectors were to derive personal benefit from the collection other than the payment of ‘reasonable’ commissions.\textsuperscript{29}

The combined effect of these provisions is to limit considerably the regulatory reach of the statute. Charity media appeals do not require a fundraising permit and are not subject to any special regulation under charity law (Costello Report, 1990). Solicitation by direct mail and telephone also fall outside the existing statutory regulation framework, as does direct solicitation of individuals to set up bank mandates in favour of charities (Law Society of Ireland Report, 2002). Similarly, third party events held in aid of charities, such as Gala Balls, and online gaming fall outside the regulatory net.

There is broad agreement that the existing Irish fundraising legislation is out-dated and ineffective. In the past 15 years four reports have studied the shortfalls in fundraising regulation and have put forward proposals for its reform (Costello, 1990; Law Society, 2002; and Department of Justice, 1996 and 2000). Summarising the inadequacies of the 1962 Act, the authors of the most recent report in 2002 state that:

While the Act creates many offences, it omits to provide for any systematic way of checking abuses. The penalties for offences are very small in terms of the sums which can be collected in successful collections. . . . [A]pplicants [must] provide only minimal information about themselves and their organisations. . . Enforcement is left to the initiative of the local Gardaí, and is not monitored or reviewed on a countrywide basis. There is no [default] provision requiring the permit holder to account for the funds collected. . . Members of the public have no right to inspect the accounts of the collection. There is no requirement to clarify if any of the collectors are to be paid for their work, and if so at what rate. There is no requirement that the percentage of funds going to the charity should be disclosed on collection boxes or goods sold (Law Society of Ireland Report, pp. 169–70).

Thus, the existing Irish regime places all the responsibility on the state to regulate fundraising and excludes the public from making inquiries into fundraising practices while freeing charities of any obligation to disclose information relating to their fundraising activities. The current legislation fails to address current fundraising practice concerns; it restricts unnecessarily legitimate fundraising activities of organisations and results in increased compliance costs for charities. Worse still, the ineffectiveness of these statutes has resulted in non-enforcement by regulatory authorities, thereby leaving certain areas of fundraising practice virtually un-policed and open to malpractice. Ireland’s situation is an extreme case.

The lack of effective regulation distinguishes Ireland from other jurisdictions such as England and Wales, where renewed efforts to deal with fundraising regulation began in earnest with Parts II and III of the Charities Act 1992, the Charitable Institution (Fundraising) Regulations 1994 and most recently, Part 3 of the Charities Act 2006 (replacing Part III of the 1992 Act). The effect of these regulatory efforts is to bestow on England and Wales a system
of fundraising regulation comprising a Central Regulator Model (in the form of financial disclosure to the Charity Regulator) coupled more recently with a Self-regulation Model for policing operational fundraising practices. This recent focus on self-regulation in England and Wales with the creation of a Fundraising Standards Board, a self-regulatory oversight body that has been replicated in Scotland, points to UK policymakers’ dissatisfaction with sole reliance on a Central Regulator Model as a method of fundraising regulation. The concurrent existence of a Central Regulator Model and a Self-Regulation Model in the UK, however, falls short of the Hybrid Model envisaged in this paper. The lack of integration between the two regulatory regimes means that the positive externalities associated with the Hybrid Model are lost. The UK, in this respect, is under greater constraint than a less-regulated jurisdiction (such as Ireland) when it comes to changing fundamentally its policy on fundraising regulation since it must operate in light of its existing regimes. Paradoxically, the absence of workable fundraising regulation in Ireland provides greater scope for regulatory innovation while simultaneously increasing the requirement for a new effective regulatory regime.

CRITIQUING THE CONSTRUCT: ARE IRISH PROPOSALS A PRACTICAL PROTOTYPE OF THE HYBRID MODEL?

Research commissioned by the nonprofit Irish Charities Tax Research (Trinity Report, 2007) reveals that fundraised income accounts for just over 20 percent of charities’ incomes in Ireland (with 60 percent coming from the state and the balance from fees and other sources). In a mapping survey sample of 960 fundraising charities, more than 50 percent received less than €13,000 in fundraised income with six out of ten charities raising less than €21,000 per annum. The top ten percent of fundraising charities, measured by reference to their private income sources, raised more than €200,000 per annum. Thus, two diametrically different fundraising experiences exist in Ireland. On the one hand, there are large (predominantly national) organisations that employ professional full-time fundraising teams engaging in a wide variety of fundraising methods from corporate sponsorship to face-to-face fundraising. On the other hand, there are smaller local or regional organisations that undertake fundraising on a part-time basis, using volunteers and relying on community ties and personal relationships to raise necessary funds. These different fundraising experiences do not lend themselves to a one-size-fits-all form of fundraising regulation nor is there a ready forum in which to discuss common concerns amongst fundraisers since the dissolution of the Fundraising Institute of Ireland in 2003.

The new Irish Charities Bill 2007 proposes a three-pronged approach to reform of charitable fundraising by:

1. modernising the existing 1962 fundraising legislation;
2. conferring the requisite powers on a new Charities Regulator to require charities to provide information concerning their fund-raising activities, e.g., in their applications for registration, as well as in their annual accounts and annual returns; and

3. implementing agreed codes of good practice in relation to the actual fund-raising operations, while retaining reserve powers for the Minister, after consultation with the Charities Regulator, to make statutory regulations on the manner and conduct of fundraising if such an approach proves ineffective.

Work on the basis for the codes began in 2006 with the Government’s appointment of Irish Charities Tax Research Ltd (ICTR), to carry out a public consultation on the development of appropriate codes and to make recommendations to Government. Phase I, consisting of two nationwide rounds of public consultation and an international roundtable with European fundraising regulators, resulted in the publication in April 2007 of draft proposals for a system to develop agreed codes of good practice to manage and oversee charitable fundraising activities (ICTR, 2007). Working with charity representatives and fundraiser practitioners in Phase II, ICTR tested the proposed model through the development of a Statement of Guiding Principles for Fundraising (ICTR, 2008a). In March 2008, ICTR submitted the Statement of Principles along with a Feasibility Study Final Report on Regulation of Fundraising by Charities through Legislation and Codes of Good Practice to Government (ICTR, 2008b) (hereinafter ‘Feasibility Study’). The Feasibility Study sets forth a scheme for the development of codes of practice, advising on the rule standards to be included, the drafting of the codes, their monitoring, the funding of the scheme and the potential for interaction between Ireland and Northern Ireland in the area of fundraising regulation. The proposed statutory framework, combined with ICTR’s Feasibility Study and its Statement of Fundraising Principles, provide an interesting example of an integrated approach to fundraising regulation, the potential success of which can be tested against our conceptual Hybrid Model.

Proposals for Fundraising Regulation in Ireland: How Closely do they Approximate the Hybrid Model?

The Irish regulatory proposals satisfy a number of the Hybrid Model’s criteria with regard to charity sector input into the drafting of the codes and independent monitoring of the codes’ enforcement. The ICTR Feasibility Study recommends that the charity sector should have the lead role in drafting the codes of practice with professional assistance and a strong independent input (ICTR, 2008b). To monitor the codes’ implementation the Feasibility Study advises that a monitoring group, composed of representatives of the charity sector, a majority of independent members and an independent chair be established. This group would actively monitor the codes’ implementation, respond to public
complaints and design remedial agreements to resolve code breaches, which if not implemented by the charity would then be referred to the Charities Regulator for further action – thereby creating a positive feedback mechanism between voluntary and compelled compliance.

The Feasibility Study also calls for the establishment of an implementation group to launch the scheme. The envisaged implementation group would convene the drafting working groups for the codes and the monitoring group for the codes, liaise with Government on the funding necessary to promote awareness of the codes, and facilitate education and training for charities (particularly small charities) on fundraising practice. The implementation group would also be responsible for holding discussions with authorities in Northern Ireland on the potential application of the codes on an all-island basis (ICTR, 2008b). The state would underwrite the costs of the codes working group, the independent monitoring group and the implementation group.

The proposed codes of practice would be non-statutory and therefore not legally binding on charities (ICTR 2007, Recommendation 5). The Feasibility Study states, however, that ‘ways and means will be examined for incentivising adoption and utilisation of the Codes’ (ICTR, 2008b, p.16). The report stops short of recommending that other regulators (i.e., aside from the monitoring group) should take code standards into account when dealing with complaints relating to fundraising activity. In this regard, the Irish proposals do not go as far as the Hybrid Model in dealing with charities that do not sign up to the codes. This deficiency, unless countered through a high rate of charity participation in the codes, will weaken the effectiveness of the Irish regulatory model.

Reliance on code coverage of members to regulate a fundraising practice on a sector-wide basis can be dangerous if there is a poor take-up rate in the charity sector: witness the slow rate of sign-up experienced in the UK where there are in excess of 24,000 fundraising organisations of which at present only 800 are members of the Fundraising Standards Board (FSB). The ICTR Statement of Fundraising Principles does, however, recognise the importance of an integrated policy approach to the regulation of fundraising practices, commenting that ‘the modalities of the relationship between the Regulator, the charities’ fundraising sector, individual charities, the Monitoring Group and the public need to be established at the earliest stage’ (ICTR, 2008a, p.13). Action in this regard will be essential if the full benefits of the Hybrid Model are to be exploited.

Although the General Scheme for the Charities Bill in 2006 proposed that proof of financial report submission to the Charities Regulator be a prerequisite for the grant of future fundraising permits, neither the Charities Bill 2007 nor the ICTR Feasibility Study have endorsed this proposal. This omission will again weaken the integrated coverage of the Irish model by breaking the regulatory circle of activity from pre-solicitation (through permit control) to solicitation itself (with the codes) to post-solicitation follow up (through financial reports to the Regulator). A sought-after Government commitment to underwrite the costs of the scheme, if fulfilled, will provide an element of stability to the proposed
Irish regime that is lacking in the UK regime. At present, the FSB enjoys Cabinet Office and Scottish Executive funding but this is guaranteed only for the first five years, after which time the scheme will become self-financing by its members, making the level of oversight dependent upon the level of voluntary compliance within the UK charity sector and a willingness on the part of individual charities to pay for such voluntary oversight.

To a large extent, the degree to which charities adhere to and promote the codes will determine the codes’ perceived success. The incentive for charities to sign up will be viewed against the public’s awareness of and demand for code compliance, which in turn may well depend upon the presence of an easily recognisable kite-mark or some form of accreditation process, signalling a charity’s adherence. The positive experiences of ICTR’s nationwide consultative procedures for developing the *Statement of General Principles* augur well in this regard. Drafted by a representative working group of charity practitioners and fundraising professionals and overseen by a steering group involving relevant professional expertise, the *Statement of General Principles* has been widely welcomed by the charity sector and the government with the approach seen very much as a facilitative bottom-up process.

The biggest threat to the proposed Irish model will be the failure to integrate effectively the constituent elements, as proposed by the Hybrid Model. It is one thing to require submission of annual reports, applications for fundraising permits and adherence to best practice principles, it is another to process this information in a manner that contributes to effective oversight. If effectively utilised, a coherent triumvirate of scrutiny spreads the burden of regulation across the three moments of solicitation, engaging all relevant stakeholders. If poorly designed/implemented as independent cumulative requirements as opposed to integrated coherent regulatory requirements, the Irish proposals risk subjecting Irish charities to unrelated multiple accountabilities, discussed earlier (Edwards and Hulme, 2002). Reporting is an onerous burden for charities if these reports do not inform the permit application process in a useful fashion. If divorced from the larger policy goals of regulation, badly designed permit processes generate unnecessary regulatory burdens that can even threaten the legitimacy of the regulation (OECD, 2003). Equally, codes of conduct that do not enable us to identify bodies that flout code principles and impose effective sanctions will not solve the regulatory problems that gave rise to the need for a code in the first place.

**CONCLUSION**

This paper set out to review existing models of fundraising regulation by identifying the policy goals they seek to achieve and by assessing their practical effectiveness in achieving those ends. As part of this inquiry consideration has been given to the different stages in the lifecycle of charitable solicitation (i.e., the moments of pre-, during, and post-solicitation) and to the stakeholders
benefited or affected at each of these times. The appealing features as well as the major disadvantages of four conceptual regulatory models have been considered in detail. The outcome of this analysis reveals that each of the four models considered suffers from sufficient shortfalls that prejudice their ability to achieve effectively their chosen policy outcomes. None of these models can adequately accommodate the broader spectrum of predominant policy concerns associated with charitable solicitation in most jurisdictions – namely the avoidance of fraud, the empowerment of donors to make informed choices in the distribution of their funds to charity, and the encouragement of greater charitable efficiency in the solicitation process – to function as an exclusive regulatory model. One response to this problem has been to run in a parallel fashion a number of different regulatory models in a given jurisdiction. Thus, it is common to find self-regulation models running parallel to central regulator models, which may themselves in some countries be further supplemented by models relying on donor disclosure requirements or capping of the amount that can be spent on fundraising expenses within a single charity campaign.

The difficulties that this multiple model approach can lead to are one of simultaneous multiple accountabilities (arising from the parallel demands, whether for different information or duplication of requests for information already provided under each model) which can result in over-accounting (caused by such multiple demands) or under-accounting (as each stakeholder assumes that some other user is taking responsibility for effective oversight). The outcome in both cases is ultimately the same: a regulatory regime that provides weak accountability and results in unintended practical outcomes that hamper the achievement of the original policy goals. The solution proposed in this paper has been to isolate the attractive features of the existing regulatory models and to incorporate them, where possible, into a new regulatory model, referred to here as the Hybrid Model. The integrated nature of the Hybrid Model is deliberately designed to provide a streamline solution to the problems caused by using multiple but unconnected fundraising regulation models. By reviewing the entire life-cycle of the charitable solicitation process, the aim of the Hybrid Model is to create a triumvirate of scrutiny between the state, charities and the public, which if adopted as a package, should lessen the onerous burdens of multiple accountability by evenly distributing the checkpoints for compliance over the solicitation process and providing for more informed joined-up stakeholder oversight.

The Hybrid Model offers a useful starting point for any jurisdiction that is currently reviewing its fundraising regulatory regime at present. It may prove to be particularly valuable in jurisdictions that do not currently have workable regimes in place and are willing to start with a policy whiteboard in the design of a new regime. For those jurisdictions that have functioning, if not always efficient, fundraising regulatory regimes, the Hybrid Model offers a useful review tool that may assist in the simplification of existing administrative regimes while simultaneously identifying gaps in oversight that need attention.
The assessment of the current Irish fundraising regulatory proposals against the Hybrid Model reveals that the proposals score well in some areas but could be further strengthened in others. The policymakers’ deliberate decision to combine statutory and non-statutory methods of fundraising regulation within an integrated Scheme is commendable, as is the manner in which the charity sector and the general public have been genuinely involved in the development of the Statement of General Fundraising Principles. The proposal to have charity sector-led development of codes of practice enforced by an independent body with a minority charity representation is also in line with the Hybrid Model.

A neutral feature is the proposed creation of an implementation group to facilitate the set-up of both the drafting group and the monitoring group and to liaise with government on training and resources for the sector. This might be seen as an Ireland-specific issue arising from the lack of a charity representative umbrella group that might otherwise carry out this task in another jurisdiction. On the plus side, two other features deserve mention. First, the expected Government commitment to underwrite the costs of the Scheme and of the new bodies (separate to existing Government commitments to fund the new Charity Regulator to be set up under the Irish Charities Bill 2007) provides necessary stability in an area in which there has been little investment in regulatory infrastructure for the past fifty years. Second, the statutory reserve power of the Minister to make statutory regulation for charitable fundraising should act as a significant incentive for charities to participate in and comply with the codes. Greater force could be given to this threat if the Irish Charities Bill included a compulsory five-year obligation on the Minister to conduct a review of the fundraising regulation regime in parallel with the review of the effectiveness of the charity legislation, currently envisaged by s.6 of the Charities Bill.

On the negative side, the break of the link between submission of financial reports and subsequent applications for fundraising permits is unfortunate. It is particularly so because it decreases the incentive to revise the statutory application process for permits. The direct transposition to the Charities Bill of the provisions of the Street and House to House Collection Act, 1962 for awarding and monitoring compliance with permits is a cause for concern. These provisions provide for a bureaucratic procedure imposing undue burdens on charities and on the police (who administer the permit scheme) without necessarily contributing to the policy goals of public protection. The Charities Bill 2007 extends the permit requirement to non-cash collections (e.g., face-to-face fundraising), thereby increasing dramatically the number of likely permit applications without updating the criteria or procedure for their award. In the interim, the Charities Bill does not address the problems with other common methods of fundraising, such as third-party events run in aid of a charity. In practice, charities often find that these well-meaning events are run at exorbitant cost with the charity itself having little (or no) control over the fundraising methods employed or budget spent.
It is also a misjudgment not to have encouraged other regulators to use the codes as benchmarks of acceptable conduct when reviewing a fundraising complaint. The decision not to make this recommendation limits the reach of the codes to those organisations that sign up, which tend to be the compliant bodies in the first instance, and provides no redress mechanism for the public aggrieved by the conduct or activities of a non-member. Finally, from a legal perspective, the reach of the Irish fundraising regulation proposals remains in question. The Charities Bill 2007 amends only the legislation relating to public collections. Responsibility for the regulation of lotteries and gaming falls within the remit of the Department of Justice, Equality and Law Reform and is thus not covered by the Charities Bill. In light of recent media reports that one Irish charity will pay 75 percent of revenue earned from online gaming carried out in its name to the commercial managers of the game, the lack of regulation in this area becomes an important issue (Mulligan, 2007).

The alignment of policy goals with practical outcomes forces us to consider whether our chosen regulatory instrument – the ‘means’ to the ‘end’ – provides a proportionate and workable response to the policy problem at issue. A regulatory regime that enhances the levels of public trust (through the avoidance of fraud), empowers donors to make informed choices in their charitable giving and encourages charities to be cost-efficient in fundraising may require strong regulatory measures to prevent fraud while requiring more tailor-made measures to take account of the differences in charity size, mission, length of establishment and nature of fundraising campaign undertaken. Cost efficiency does not always equate with low fundraising costs. If low-costs are used as the benchmark, at worst it will encourage a race to the bottom in the use of deceptive accounting formulas that perpetuate the myth that fundraising does not incur costs. At best, this practice will favour larger longer-established charities over new entrants who perhaps provide innovative services and have larger up-front costs. Donors who wish to make informed donation decisions require a range of information. In this regard, the annual financial statements issued by charities are useful to donors for assessing the viability and sustainability of the charity, but tell us nothing about the efficiencies the organisation has achieved through its spending. Finally, from a beneficiary perspective, the best charities are likely to be those that provide legally compliant, quality accredited services, which are regularly evaluated and that are run by well-trained and resourced staff, whether paid professionals or volunteers. Services of this nature require an investment in both administration and fundraising. In a charity that values excellence over thrift, quality of service might therefore well result in high fundraising costs and high administration costs. It is hoped that the suggested Hybrid Model of Fundraising Regulation, which recognises these realities, will go some way towards providing a space in which organisations can honestly report their fundraising expenses without running the risk that donors will forsake them. By adopting an integrated approach to the issue of fundraising regulation, the Hybrid Model takes account of financial information but recognises the
limitations and caveats that must accompany all such figures and seeks to both contextualise this information and provide charities and the public with supplemental mechanisms, through codes of practice for fundraising practices, for evaluating fundraising activity.

NOTES


2 Baldwin, Is Better Regulation Smarter Regulation? (2005) Public Law 485 (reviewing the potential of regulatory impact assessments to achieve and deliver smarter regulation); Regulating Better, supra n. 1 at 16 (concluding that, ‘Effective regulation requires clear, achievable objectives and ensuring that these policy goals remain to the fore throughout the regulatory process. . . An associated element of regulatory effectiveness is the need to minimise unintended outcomes.’); Mandelkern Report, supra n.1, at ii (highlighting the need for regulatory impact assessment in advance of new regulation, and the ongoing need to review and revise rules to make them more effective, less burdensome, easier to understand and to comply with.)

3 See, for example, the US Supreme Court in Secretary of Maryland v. Joseph H. Munson Co. 467 US 947 (US, 1984) in which the Court criticising solicitation legislation that applied a statutory cap model approach (commenting: ‘The flaw in the statute is [that] . . . it operates on a fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud. That the statute in some of its applications actually prevents the misdirection of funds from the organisation’s purported charitable goal is little more than fortuitous. . . . [I]f an organisation indulges in fraud, there is nothing in the percentage limitation that prevents it from misdirecting funds. In either event, the percentage limitation, though restricting solicitation costs, will have done nothing to prevent fraud.’)

4 See Section 28(2)(e) of the Irish Gaming and Lotteries Acts 1956-1986 (limiting a promoter’s costs to 40 percent of the fundraising proceeds); See also Canada’s Income Tax Act, R.S.C. 1985 (5th supp.) c. 1, ss. 149.1(1), (20) and (21) and Income Tax Regulations, C.R.C. 1978, c. 945, ss. 3701 and 3702 (subjecting Canadian charities to a disbursement quota, i.e., a specific amount that a registered charity must spend each year on its charitable activities, including gifts to qualified donees. The stated aim of this quota is to ensure that proceeds are spent on the charitable purposes and that expenses are kept to a reasonable level). See also clause 8 of Schedule 1 of New South Wales Charitable Fundraising Regulation 2003, made under s. 19 of the NSW Charitable Fundraising Act 1991 (providing that ‘an authorized fundraiser conducting a fundraising appeal for donations only . . . must take all reasonable steps to ensure that expenses in respect of the appeal do not exceed 40 per cent of the gross income obtained. . .’).


6 Sections 67 & 68 English Charities Act, 2006, requiring a statement by collectors indicating any arrangements for remuneration in respect of their fundraising efforts.

7 See n.5 above.

8 This finding contradicts the earlier findings of Janet S. Greenlee and Karen L. Brown (1999). ‘The Impact of Accounting Information on Contributions to Charitable Organizations.’ Research in Accounting Regulation, Volume 13, 111-25, which found that fundraising inefficiency has a significant, perverse positive effect on donations, and administrative inefficiency has a significant negative effect on donations.
9 See Pablo Eisenberg, Journalism’s Role in Keeping Charities Honest, *The Financial Times*, February 9, 2008 (commending the work of the US print media in uncovering ‘inappropriate expenditure, corruption, self-dealing, conflicts of interest and excessive compensation’ on the part of US charities and foundations.)

10 This tends to be the case in the United States where strategic trust and estate planning leads to more planned giving than spontaneous and ad hoc giving. A large number of US agencies provide assistance to potential donors based on a charity’s past performance. See, e.g., Charity Navigator (www.charitynavigator.org), the American Institute of Philanthropy, which maintains a list of top-rated charities (www.charitywatch.org) and BBB Wise Giving Alliance (www.give.org) – all three of which rate charities on their past financial governance and accountability.

11 These terms come from the US Inland Revenue Service Form 990. However a similar division occurs under SORP 2005 in which charities are required in their Statement of Financial Activities to allocate expenses under the headings of charitable activity, costs of raising funds and governance activity.

12 The term ‘joint costs’ is used here to refer to shared costs from combining fundraising expenses with educational or programmatic expenses. Thus, in a case in which a charity sends a direct mail to a potential donor soliciting a contribution, if this mail also contains substantive information about what the charity does and its mission or seeks to educate the donor about its charitable purpose, the cost of that mailing may be allocated between both fundraising and charitable activity. If most or all of the cost is allocated to charitable activity, this both improves the programme ratio and reduces the apparent cost of fundraising in the report.

13 Compare Palmer, Issacs and D’Silva, Charity SORP Compliance: Findings of Research Study, 16(5) *Managerial Auditing Review*, 253 (2001) (finding empirical evidence of significant variations in the presentation of charity accounts and a noticeable failure among auditors to ensure that charities complied with SORP) and Connolly and Hyndman, A Comparative Study on the Impact of Revised SORP 2 on British and Irish Charities, 17(1) *Financial Accountability & Management* 73, at 89 (2001) (noting the considerably more stringent standards introduced in the revised SORP for reporting administration and fundraising costs but still rating compliance with SORP at less than 10 percent for British charities in this regard) with Stewardship Briefing Paper, *SORP 2005 – An Overview of What Has Changed* (January, 2007) (highlighting the welcome reclassification of the expense headings and the provision of better guidance with regards to these heads).

14 See Babbidge, Ewles and Smith, Moving to Museum Trusts: Learning from Experience – Advice to Museums in England & Wales (Museums Library Archives, 2006) at 1.558 (noting that despite following SORP 2005 many museum trust accounts continue to be uninformative with many ‘contriv[ing] to understate the costs of governing/managing the charity’ and identifying the need for ‘guidance on the reporting and accounting requirements related to the SORP, with the intention of providing common practice that enables greater comparability between accounts.’)

15 See, e.g., the certifications programme run by Certified Fund Raising Executives International. CRFE International was established in 2001 as a 501(c)(6) organisation with the mission to set standards in philanthropy through a valid and reliable certification process. Its founding members were the American Association for Healthcare Philanthropy, which offered the CAHP certification programme and the Association of Fundraising Professionals, formerly NSFRE, which offered the CFRE. Following their amalgamation and the creation of CRFE International, eighteen other philanthropic associations from Canada, Australia, New Zealand and the UK joined in support of the programme. See also the Evangelical Council for Financial Accountability (ECFA) (www.ecfa.org), an American accreditation agency dedicated to helping Christian ministries earn the public’s trust through adherence to seven Standards of Responsible Stewardship. Founded in 1979, it is comprised of over 1,200 evangelical Christian organisations, which qualify for tax-exempt, nonprofit status and receive tax-deductible contributions to support their work.

16 See, e.g., Maryland Association of Nonprofit Organizations (Maryland Nonprofits). Maryland Nonprofits developed its ‘Standards for Excellence: An Ethics and Accountability Code for the Nonprofit Sector in the US’ against which it certifies applicant organisations. The guiding principles required for member and encouraged for nonmember Maryland nonprofits are replicated under a licensing agreement by other state nonprofit associations in Georgia, Idaho,
Louisiana, North Carolina, Ohio, Oklahoma, Pennsylvania, and West Virginia. In addition, Maryland Nonprofits plays an enabling role by providing training courses for nonprofits on ‘the entire spectrum of nonprofit management’.

17 See, e.g., the newly established Fundraising Standards Board (FSB) in England, Wales and Scotland, whose role is to oversee self regulation of fundraising practice and to deal with public complaints relating to fundraising. The FSB was established as a community interest company and its members agree to abide by the Institute of Fundraising’s Codes of Fundraising Practice.

18 See, e.g., the current English efforts to introduce self-regulation of charitable fundraising. In its first year of operation only 435 organisations joined the Fundraising Standards Board, the self-regulatory body for fundraising in the UK. This membership take-up figure is lower than the founders of the FSB predicated in their business plan when they envisaged a membership of over 700 at the end of their first year. See Self-Regulation of Fundraising Regulation of Fundraising Unit - Business Plan (February, 2005).

19 This is particularly true of self-regulatory codes run by professional fundraising associations. In earlier doctoral research undertaken by the author at Yale Law School, a review of the annual reports of professional fundraising associations in the UK, Australia, the US and Canada did not reveal any evidence of members of professional fundraising associations being disciplined for breach of fundraising codes of conduct.

20 Concluding at p. 339 in their study of public perception of charity management that respondents tended to assume that relatively high expenditure levels on administration and fundraising were ‘bad’ and thus incompatible with the achievement of the charity’s objectives.

21 This demand might come not only from individual private donors but also from government funding agencies that might look for adherence to the Code as a factor in deciding on successful grant applications. This demand would still fall under the category of voluntary compliance rather than compelled compliance in so far as organisations that did not subscribe to the Code would still be eligible for state funding. In practice, if adopted as a criterion in deciding funding application the de facto use of this benchmark might tend more towards compelled compliance if statutory agencies treated adherence to the Code as a threshold factor in determining successful grant applications.

22 Gaming and Lotteries Act 1956, (No. 2 of 1956), s. 28.
23 Increased from IR£500 in the original Act by Lottery Prize Regulations, SI No. 29/2002.
25 Defined in section 1 of the Street and House to House Collection Act, 1962 Act as including ‘a collection of money from the public in any public place . . . or by house to house visits . . . for the benefit (actual, alleged or implied) of a particular object, whether charitable or not charitable, and whether any badge, emblem or other token is or is not exchanged or offered in exchange for money so collected, but does not include street-trading.’
26 Defined in section 1 of the Street and House to House Collection Act, 1962 as ‘any place to which the public have access whether as of right or by permission and whether subject to or free of charge but does not include a church or building used for public worship or the grounds of a church or of such a building,’
27 Section 6 of the Street and House to House Collection Act, 1962 (No. 13 of 1962). Note that Section 2 (5) excludes the application of the Act to collections for charitable objects under the control of a religion recognised by the State under Article 44 of Bunreacht na hEireann, and held in accordance with the laws, canons and ordinances of the religion concerned.
28 See sections 3 and 4 of the Street and House to House Collections Act, 1962.
29 See section 9 of the Street and House to House Collections Act, 1962.

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