The Perks and Perils of Non-statutory Fundraising Regulatory Regimes: An Anglo-Irish Perspective

Dr. Oonagh B. Breen

Senior Lecturer in Law
School of Law, University College Dublin
Ireland
Oonagh.breen@ucd.ie
Introduction

How should one measure the success of a non-statutory method of charitable fundraising regulation? Various factors have been suggested as the litmus test of successful regulation. For some, the extent of a scheme’s coverage and how quickly it goes to scale are the most important indicators of success. Other touted factors include the effectiveness of the regime (although there is debate over how effectiveness should be assessed); the scheme’s ability to be self-sustaining and its ability to regulate across the spectrum of organizations so that its standards are both flexible enough to accommodate small charities yet sufficiently rigorous to provide meaningful regulation for larger entities. Finally, as with all self-regulatory regimes, the existence and imposition of sanctions and a public record of their enforcement might also be seen as indicators of success.

The ability to evaluate the effectiveness of a fundraising regulatory model becomes particularly acute when its continued existence is predicated upon its success, however such success is defined. Recent charity legislation in Ireland and in England and Wales provide reserve powers for the respective governments to introduce statutory regulation of charitable solicitation if the non-statutory regimes currently being trialled in both jurisdictions fail to deliver on their promises. Both jurisdictions are experimenting with what might best be referred to as a form of hybrid regulation in the context of charitable solicitation – regulation that combines the granting of a statutory license to collect in public with a non-statutory oversight of the operations of licensees. It is there, however, that the similarities between the two jurisdictions end. Two very different stories are emerging from the Irish and the English experiences with self-regulation.

This paper tracks the paths taken by each jurisdiction, plotting those paths against the different legal and cultural backdrops of charity law in Britain and Ireland. In so doing, the paper explores the definition of success for each regime and examines whether the later player to the regulatory table (Ireland) can learn anything from the experiences to date of its neighbour. Part I sets out the UK non-statutory framework for fundraising regulation, detailing the structure of the Fundraising Standards Board (FRSB), its achievements to date and the obstacles that now face it. Part II reviews the Irish proposals for non-statutory regulation, evaluating the proposed Statement of Guiding Principles for Fundraising against the different UK framework and outlining the challenges inherent in the Irish approach. Part III then considers what lessons the British experience holds for Irish policymakers. Part IV compares the Anglo-Irish approach to fundraising regulation with those approaches adopted recently in Canada, the Netherlands and the United States. The paper concludes in Part V with a return to the broader question of how we measure success in regulatory terms. In so doing it submits that our starting point should be the identification

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1 UK Charities Act 2006, s.69; Irish Charities Act 2009, s. 93. The prevalence of reserve statutory powers is not a new phenomenon in the context of self-regulatory regimes but has been long-used by states as means to bring about the interaction of private and public action in particular policy areas. *See* earlier examples of similar attempts in Rob Baggott, "Regulatory Reform in Britain: the changing face of self-regulation," (1989) 67(4) Public Administration 435.
of the constituency type sought to be regulated and in light of this cohort’s features we can begin to prioritise the salient matters for inclusion on any proposed policymaker’s checklist.

I. The UK Route to Self-Regulation amidst a Statutory Regime

The UK impetus for self-regulation of fundraising activities arose originally in 2002 with the Prime Minister’s Strategy Unit Report, “Private Action, Public Benefit”, which recommended the revision of existing local authority controls over the public nuisance aspects of fundraising in tandem with the introduction of a scheme of self-regulation to promote good practice amongst fundraisers. There was general consensus regarding the need for such law reform with existing laws dating back to 1916. Previous attempts to update fundraising regulation had proved less than successful. The Charities Act 1992 had set out a new regime for door-to-door and street collections and in so doing had sought to repeal the House to House Collections Act 1939 (which, as its name suggests, regulated door to door collections) and the Police, Factories (Miscellaneous Provisions) Act 1916 (which regulated street collections) in their entirety. The relevant provisions of the 1992 Act (contained in Part III of the Act) were never brought into force, however, due to fears over the difficulties of practical implementation.

Following on from the 2002 Strategy Unit Report, a two-pronged strategy emerged. On the legislative front, the Charities Act 2006 replaced the unimplemented Part III of the 1992 Act with an entire new chapter governing the licensing of public collections. Second, s. 69 of the 2006 Act gave the Minister a reserve power to control fundraising activities by charitable institutions. This reserve power would remain in abeyance so long as the second prong -- a self-regulatory regime introduced to police the actions of charitable fundraisers -- was deemed to have achieved its intended results. And it is to that self-regulatory scheme that we now turn our attention.

In response to the Strategy Unit’s 2002 recommendations on the need for self-regulation an independent commission, funded by the Institute of Fundraising (“IoF”) and chaired by Rodney Buse, was set up to consult on the issue. The Buse Commission Report, delivered in 2003, recommended the creation of a UK-wide regulatory scheme that we now turn our attention.

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2 Strategy Unit, Private Action, Public Benefit, 6.21 (2002).
3 The Local Government Act 1972 transferred responsibility for licensing both street collections and house to house collections from the police to the relevant local authorities with the exception of London where the metropolitan police and the Council for the city of London remain responsible.
5 2006 Act, Part 3, Chapter I. These provisions are not yet in force. Previous Labour proposals to consolidate charity legislation omitted all fundraising provisions from the consolidated Bill – see Office of the Third Sector, Draft Charities Consolidation Bill: Consultation on the draft Bill and draft pre-consolidation amendments order, at 5 (September 2009). This Bill fell with the 2010 General Election, only to be resurrected by the new coalition Government – see Charities Bill 2011, Sch. 9(1) as published March 4, 2011 (available at http://www.publications.parliament.uk/pa/ld201011/ldbills/050/11050.i-v.html#top, last accessed March 31, 2011).
self-regulation regime for fundraising regulation, based on the Office of Fair Trade's self-regulatory framework. The report received widespread, although not universal, welcome.

The Buse proposal was further considered and refined by a sector-wide steering group, chaired by the Charities Aid Foundation in 2004. The final regulatory proposals, supported by an IoF business plan were given life in the form of the Fundraising Regulation Standards Board (FRSB), established in 2006 on foot of five-year seed funding from the British government. The FRSB is hosted by the IoF and adopts the codes of the IoF as its own, although membership of the IoF does not make an entity an automatic member of the FRSB, thus requiring a fundraising charity to join the FRSB separately and pay the relevant membership subscription.

The ability to measure the effectiveness of such a regime has been a critical factor for British policymakers, one that predates the establishment of the Board. In 2005, as part of the preparations for the introduction of an independent overseer of fundraising activity, the Home Office issued a consultation paper on the prospective criteria by which to assess the success of the then-proposed FRSB self-regulation regime. This consultation process led to the publication in 2006 of a list of principles against which the Government proposed to assess the success of voluntary sector fundraising self-regulation. Those criteria are worth outlining. According to the Home Office, there are twelve indicators of success, namely:

1. The scheme will need to attract high levels of voluntary participation across the sector, although it is appreciated that it will take time to build up levels of participation. Participation should reflect the diversity of voluntary sector fundraising.[The Coverage Principle]

2. The scheme and its participants must provide a clear public promise of what should be expected from fundraisers who are participants in the scheme, and from the scheme itself. The Codes of Practice underpinning the scheme should go beyond requiring compliance with the law, and should set a high standard of good practice. [The Clarity Principle]

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7 Emma Meier, “Buse Commission Report: Sector warmly receives recommendations” Third Sector, February 4, 2004 (noting support by the NCVO, the Institute of Fundraising, the Public Fundraising Regulatory Association, CAF and the Charity Commission for the Commission’s proposals, which included setting up an independent body called the Charitable Fundraising Standards Board (CFSB) to oversee fundraising practices.)
10 Charities Unit, Home Office, Principles for Assessing the Success of Self-Regulation of Fundraising, A consultation paper (14 March 2005).
3. The scheme and its participants should actively encourage awareness amongst non-members and the public of the scheme’s existence, and good fundraising practice. **[The Profile Principle]**

4. The scheme should promote openness, transparency and accountability in fundraising practice. **[The Transparency Principle]**

5. The control of the scheme must be independent and impartial. Its governing body must include consumer representatives and those with fundraising experience. **[The Impartiality Principle]**

6. Compliance with the scheme must be monitored proportionately. But there should not be complete reliance on self-certification. **[The Proportionate Compliance Principle]**

7. There must be fair and effective sanctions for non-compliance, which are proportionate to the nature and extent of any non-compliance. The initial focus should be on improving performance. **[The Proportionate Sanction Principle]**

8. The scheme must have a clear and effective complaints handling process which is easily accessible to the public and which provides fair redress. **[The Feedback Principle]**

9. The scheme must be clear about its remit and should work effectively with other regulators, particularly where issues are outside its remit. **[The Regulatory Cooperation Principle]**

10. The scheme must be accountable through the publication of an annual report that details the scheme’s performance. The scheme should also develop its own meaningful performance indicators following consultation with stakeholders. **[The Reporting Principle]**

11. The scheme should identify emerging trends in fundraising practice, and the public’s perception of it, and be sufficiently flexible to quickly adapt and evolve Codes of Practice where necessary **[The Policy Principle].**

12. Regulation should be proportionate and the scheme should keep to a minimum any regulatory burden to participants.”

It is unclear whether these indicators are alternative or cumulative or whether overwhelming success in relation to one indicator might compensate for failure or lesser levels of achievement in one or more of the other indicators. Before considering whether since its launch to the public in 2007, the FRSB has managed to meet these criteria, it is necessary first to say something of (a) the structure of the Board; (b) its work to date and (c) the challenges that it currently faces.
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**(a) The Structure of the FRSB**

The FRSB is established as a community interest company but has no statutory foundation and thus has no protection in case of legal action against it by an aggrieved charity. The Board is comprised of a Chair, two representatives from UK voluntary sector bodies, one representative each from the consumer body Which?, the Charity Lawyers Association and the Public Fundraising Regulatory Authority (PFRA) and the Institute of Fundraising (IoF) along with five lay board members, who represent the general public. The FRSB currently has 1,258 members. The relationship between the FRSB and its members is based on contract, which theoretically should make enforcement easier. According to its 2009 Annual Report, the vast majority of its members are small to medium sized fundraisers, mostly residing in England. Collectively, FRSB members represent 40 percent of all UK voluntary income. Notwithstanding these heartening figures the fact that there are an estimated 24,000 fundraising charities in the UK means that less than 5 percent are currently members of the self-regulation scheme.

A second issue with regards to the structure of the FRSB is its commitment to the impartiality principle, alluded to above. In deference to this criterion, the FRSB has steadfastly insisted that charities’ representatives are ineligible for Board membership. This exclusion of charity representatives from the governance and decision-making process of the FRSB prompted charities to create their own forum for discussion in 2009 when they established the FRSB members’ Advisory Forum, consisting of 25 self-selected members, equally divided by income, including suppliers, “to give members the opportunity to feed back on the scheme’s progress and express views, opinions and concerns which will contribute to its development.”

**(b) Work to Date of the FRSB**

On February 9, 2011 the FRSB celebrated its fourth public birthday although it existed for a full year before its launch to the public and thus is in its last of five years of seed funding. Its priorities to date have focused on increasing

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12 These representatives hail from the National Council for Voluntary Organisations (NCVO) and the Northern Ireland Council for Voluntary Action (NICVA). These seats rotate amongst the regional voluntary councils with previous holders being SCVO and WCVA. The inclusion of NICVA may be something of a strategic appointment on the part of the FRSB since to date Northern Ireland has not signed up to participate in the self-regulatory regime nor has it funded the FRSB in any way. The inclusion of the NICVA representative may be an attempt to encourage buy-in by Northern Irish charities in an effort to persuade the Department of Social Development in Northern Ireland to engage.

13 Figures are current to February 2011.

14 According to the Fundraising Standards Board, Annual Report 2008/09, 71 per cent of FRSB members raise under £1 million a year while 83 percent of them are based in England with a further 13 percent of the membership in Scotland, 3 in Wales, and 1 percent in Northern Ireland.

15 Home Office Charities Unit, Principles For Assessing The Success of Self-Regulation of Fundraising: A Consultation Paper, 18 (March 14, 2005).

membership and engaging with the public both through raising awareness of the scheme and dealing with fundraising complaints from the public that charity members have failed to resolve satisfactorily on their own. Three annual reports for 2007/08 (‘the 2008 Report’), 2008/09 (‘the 2009 Report’) and 2009/10 (‘the 2010 Report’) provide some further information on achievements to date.

On the membership front, FRSB has concentrated on attracting the largest charities with the largest shares of fundraised income first. This has two advantages: first, large charities generally have professional fundraising staff and well developed practices and may already be members of the Institute of Fundraising. Having them join the FRSB not only raises the profile of the scheme with the general public but it also boosts the amount of fundraised income that the FRSB can claim is covered by the scheme. The second advantage is pecuniary. Larger charities pay substantially higher membership subscriptions to the FRSB. The cost of membership for these organisations has increased exponentially in recent years. Persistent failure to reach its target number of members forced the FRSB to raise subscriptions for larger organisations by a staggering 177 percent in 2008,\(^\text{17}\) a factor (though not the rate of the increase) noted by the FRSB in its 2009 Report as affecting 10 percent of members.\(^\text{18}\)

Depending on how the Office for Civil Society interprets “coverage”, the FRSB faces an unenviable task in proving its success in this sphere. At present, 60 percent of UK fundraised income is raised by organisations that are not members of the FRSB.\(^\text{19}\) If these charities are predominantly small or medium sized, reaching out to them and getting them to engage will be costly and at best, a slow process.\(^\text{20}\)

A second priority for the FRSB, according to its reports, has been to raise public awareness of its existence. The inclusion of the FRSB logo on fundraising material has been the main vehicle for this engagement along with the launch of a website aimed at donors called ‘Givewithconfidence.org.uk’ which allows the public to check whether a charity is a member of the FRSB, to inform them of the donor’s charter to which FRSB members subscribe (referred to as ‘the Fundraising Promise’) and to assist them in making a complaint if they feel a charity has breached this charter. These steps are important steps towards building public trust which, according to the 2007 Charity Awareness Monitor (an annual survey of 1,000 people), was at an all time low with only two in five adults stating that they trusted charities.\(^\text{21}\) It is interesting to note the reported positive effect of the FRSB logo on public trust: according to the FRSB’s second annual report, 71 percent of the Scottish public would trust a charity more if it

\(^{17}\) Third Sector Online, “FRSB to charge larger charities more,” August 15, 2008 (noting a rise in annual membership fees for charities with incomes above £50 million per year from £1800 to £5000).


\(^{20}\) Thus, the rate of membership growth has been low with membership numbers rising by 35 in the period between June 2010 and February 2011.

\(^{21}\) Charity Awareness Monitor 2007, nfpSynergy March 2008 (www.nfpSynergy.net), reported in the FRSB Annual Report 2009 at 18. This is the lowest figure since the survey was started by nfpSynergy in 2003.
was displaying the FRSB tick whereas 37 percent would give more money to a charity if they knew it was an FRSB member.\textsuperscript{22} Engendering such trust amongst the public, however, is an expensive exercise and research shows that the introduction of an accreditation system per se will not increase trust in the nonprofit sector.\textsuperscript{23} It is perhaps unfortunate therefore that in an attempt to balance its books the FRSB radically cut its marketing budget for 2010 from £97,000 to £35,000.\textsuperscript{24}

A third development of interest has been the FRSB’s engagement with the public in commissioning research of public views on particular fundraising practices so as to inform the sector and where possible, to inform the development or the review of existing codes of practice. Two examples illustrate this point: in November 2007, the Board published the results of its public survey on direct mailing practices,\textsuperscript{25} which revealed strong views amongst the public toward this method of fundraising. Ninety percent of respondents expressed unhappiness at the enclosure of gifts or incentives in direct mail, preferring that money to be better spent on the charity’s cause. Charities also felt the brunt of public dissatisfaction with direct mail practices. According to charities’ complaint returns for the FRSB’s first annual report in 2008, one third of public complaints related to direct mail. The FRSB’s research fed into an ongoing IoF public consultation on the need for a code of practice for direct mailing and on which committee the FRSB enjoyed observer status. Following a two-year period of discussion and drafting, the IoF launched a new Code on Direct Mail in May 2008, making it the first code issued since the establishment of the FRSB.\textsuperscript{26} More recently, following a complaint by a member of the public to the Advertising Standards Authority on child sponsorship schemes by development charities, the FRSB (in consultation with the Charity Commission, the IoF, the Committee of Advertising Practice and five leading charities in this field) launched new guidance on fundraising that asks the public to sponsor a child.\textsuperscript{27}

The need for greater clarity on best practice in the area of direct mail is particularly timely. The FRSB’s 2009 Report revealed that three quarters of all complaints to FRSB member charities in 2008/09 related to direct mail.\textsuperscript{28} This revelation has had two effects: first, it prompted the IoF to call on its members to blow the whistle on examples of poor direct mail fundraising practice in May 2009. Members responded by providing the Institute with twenty cases of bad

\textsuperscript{22} nfpSynergy Scottish Charity Engagement Monitor (SCEM) October 2008 Research conducted by nfpSynergy in its Scottish Charity Engagement Monitor in October 2008 with 1000 members of the Scottish public and cited in the FRSB Annual Report 2008/09 at 8.


\textsuperscript{24} Third Sector, “A Crucial Year Ahead for the Fundraising Standards Board,” February 2, 2010.

\textsuperscript{25} FRSB, \textit{Signed, sealed and delivered.} November 2007 \url{www.frsb.org.uk/pdf/FRSB_Signed_Sealed_Delivered_Exec_Summary_Nov07.pdf}.

\textsuperscript{26} Institute of Fundraising, Direct Mail Code of Fundraising Practice (May, 2008) available at \url{http://www.institute-of-fundraising.org.uk/Resources/Institute%20of%20Fundraising/Codes/Direct%20Mail%20May%202008.pdf} (last accessed March 17, 2010).

\textsuperscript{27} Available at \url{http://www.frsb.org.uk/english/news/54/22/New-Child-Sponsorship-Charter/} (last accessed March 24, 2011).

\textsuperscript{28} FRSB, Annual Report 2008/09.
practice relating to 16 different charities. Half of these charities agreed to change their practices following contact with the IoF but the remaining eight (seven of which were clients of a now defunct fundraising agency)\(^29\) denied that their actions constituted breaches. In one case, a charity admitted breaching the code but expressed no intention to change its practices. These denials prompted the IoF to refer these cases to the FRSB in late 2009. Although neither body publicly identified the referred charities, according to the IoF ‘most’ of them were not IoF members and thus are not formally bound by the code in the first instance. This impasse caused difficulties for the FRSB, which in March 2010 began to meet with the charities involved in the hope of persuading them to see the error of their ways and to join the FRSB. The second ripple effect of the 2009 Report on Direct Mail has been to cause the FRSB to change its data collection requirements so that it can better ascertain what particular aspects of direct mail fundraising practice are causing concern.\(^30\) The 2010 Annual Report revealed that frequency of communication was the most common complaint with poorly addressed communications and data protection issues also featuring strongly in the breakdown.\(^31\)

The functioning of the complaints process is of particular importance to the success of the self-regulation scheme being one of the indicators of success identified by the Home Office (referred to above as the ‘feedback principle’). The process for FRSB members consists of three stages. At stage one, charities engage directly with the complainant to resolve the complaint. If the complainant is not satisfied, he/she can complain to the FRSB at which stage the complaint is escalated to Stage 2.\(^32\) At this point in time, the FRSB investigates the complaint and tries to facilitate a resolution between the charity and complainant. If no agreement is forthcoming, the complaint can be escalated to Stage 3, at which stage the Board of Directors of FRSB will consider whether the charity has broken one of the fundraising codes, either publicly accepting or rejecting the complaint. Upon finding a breach, the FRSB can require the charity to change its procedures in future or, for particularly egregious conduct, it can expel the charity from the scheme. To date, four complaints have reached a stage 3 adjudication.\(^33\) There have been two unsuccessful complaints against Cancer Research UK;\(^34\) one quasi-successful case against UNICEF;\(^35\) and most recently

\(^{29}\) Kaye Wiggins, “Fundraising Standards Board pursues complaints about eight non-members,” Third Sector, July 6, 2010 (detailing the downfall of fundraising agency CSDM, which went into administration in June 2010 only to rise from the ashes with its assets intact in the form of two new companies one month later.)

\(^{30}\) Kaye Wiggins, “Fundraising Standards Board wants extra information on direct mail and telephone fundraising complaints,” Third Sector Online, January 11, 2010.


\(^{32}\) There were 22 Stage 2 complaints in 2008/09, all but two of which were resolved satisfactorily. In 2009/10, there were 19 Stage 2 complaints, all of which were resolved at this stage.

\(^{33}\) For further information on the substance of these complaints see Section 3 infra.

the first successful complaint upheld by FRSB against the charity, Painted Children.36

In its first annual report in 2008, the FRSB reported a total of 8,434 complaints received by member charities.37 By the date of its second annual report for 2009, the number of complaints had jumped to 26,349. Seemingly unperturbed by this tripling, the FRSB defended the increase on two grounds: first, it argued one could not compare the 2008 figures with those from 2009 since the Board had not asked charities to tell it how many complaints they had received in 2007/08. Second, the FRSB claimed that 26,000 complaints was a relative drop in the ocean when compared against the many fundraising contacts charities make with the public each year (estimated by the FRSB to be in the region of 500 million, making the number of complaints in comparison to the total volume of activity a mere percentage of .05). Of this tiny margin, all but twenty-two complaints were resolved satisfactorily by the charities themselves. It subsequently transpired that the reported complaints figures for 2008/09 were inaccurate.38 The FRSB adjusted the figure to account for inaccurate returns by two FRSB members and also to exclude returns from FRSB ‘supplier’ members (i.e., agencies supplying services to charities to assist with fundraising) to ensure that no duplication of reported complaints occurred. The revised figure, as reported in the 2010 Report, fell from 26,349 to 7,766 for 2008/09.39 Perhaps the only valid statistic that one can glean from the 2008/09 Report is that that the total number of complaints made in 2009 represented only 515 of the FRSB’s then 871 members (or 59 percent), meaning that 41 percent of eligible FRSB members failed to file a complaints return.40

The most recent report for 2010 shows an increase in complaints to FRSB members yet again with a total figure of 12,945 complaints recorded – an increase of 67 percent on the adjusted figures for 2009. Of these, almost 40 percent related to direct mail with 17 percent of all complaints relating to telephone appeals and door-to-door appeals.41 All but nineteen of these

37 Fundraising Standards Board, Annual Review 2007/2008. A total of 31 percent of complaints related to direct mail with a further 21 percent of complaints relating to data protection (prompting the FRSB to liaise with the Information Commissioner and the IoF in an attempt to improve standards in this area).
39 Ibid.
40 The figure of 871 members represents those organisations whose membership exceeded 6 months. Only those members of longer than 6 months standing are required to make an annual return to the FRSB.
41 See n. 38 above, at 14.
complaints were resolved by the charities themselves with the remainder being resolved at Stage 2 without the need for a Stage 3 final adjudication.\textsuperscript{42}

Perhaps a more troubling statistic from an enforcement perspective is the discrepancy between the IoF’s own membership (which boasts 5,000 organisations subscribing to its codes) and the FRSB’s membership, which currently sits just above 1,200. There are no statistics available on the degree to which these memberships overlap but since an organization can join the FRSB without being a member of the IoF, the actual level of shared membership between the IoF and FRSB may be much lower than 1,200.\textsuperscript{43} It follows that there are therefore many members of the IoF who are obliged to abide by the Codes of Practice but against whom enforcement by the FRSB does not currently lie.

One would assume, given that the IoF promulgates the codes of conduct and insists that members (who are in a contractual relationship with the Institute) abide by these codes, that where a breach occurs the IoF would initiate disciplinary proceedings against the infringing member. The Institute’s Codes of Conduct imply as much.\textsuperscript{44} Such an enforcement mechanisms would be all the more important in light of the large number of organizations that are members of the IoF but not of the FRSB. Yet, there are no public records on either the IoF website or in its annual reviews regarding membership compliance figures or any details of enforcement actions against members that persistently fail to meet IoF standards. Moreover, of the 16 direct mail code-breakers identified by the IoF in 2009 and referred to the FRSB, the IoF has remained tight lipped as to how many of these entities were IoF members and what action (if any) the IoF took against them directly.

From an administrative point of view, it makes sense to have both a code drafting body and a code enforcement body. Both of these activities are expensive and having separate membership constituencies provides a source of annual funding necessary for these activities to be sustained. Yet, from the perspective of a hard-pressed charity, one might wonder at the need to pay subscriptions to both bodies. Indeed, a charity might well strategically decide to pay subscription fees to one body only – either the IoF or the FRSB. If the FRSB is viewed as the Code enforcer, then membership of the IoF to the exclusion of the FRSB would seem a good route for avoiding imposition of sanctions. Alternatively, joining the FRSB instead of the IoF would give a charity the right to use the FRSB logo on its fundraising material, which depending on public awareness might raise its public profile as a compliant charity. And on the basis of the FRSB’s four enforcement actions to date, a charity that signs up to the

\textsuperscript{42} See n. 38 above, at 15. Of the 19 complaints, 17 related to direct mail practices while 2 related to cash collections.

\textsuperscript{43} Thus Opera North is a member of the IoF but not of the FRSB whereas Acorn’s Children’s Hospice is a member of the FRSB but not of the IoF.

\textsuperscript{44} See \url{http://www.institute-of-fundraising.org.uk/bestpractice/thecodes/codeofconduct} providing that “It is the duty of all members to assist the Institute in implementing and enforcing the code, and they will be supported by the Institute for so doing. Violation of the Code \textit{may} lead to disciplinary action including expulsion from the Institute.” (emphasis added)
FRSB's Fundraising Promise but operates less than perfect solicitation practices should have no undue fear of ultimate sanction.

(c) Challenges currently facing FRSB: meeting the Home Office’s Indicators of Success

What then are the main challenges facing the FRSB and the scheme of self-regulation as it currently stands in the UK? The most pressing issue for the FRSB is sustainability. Its 5-year seed funding runs out in 2011 and it currently lacks sufficient membership numbers to be self-sustaining in the long term. The frequent revision of target membership numbers is enlightening. Although its original launch date was postponed due to lack of numbers, the FRSB predicted in mid-2007 that it would have in excess of 4,500 members within 5 years.45 However, 2 years later, the Board had just passed 1,000 members, causing the new head of the FRSB to comment that the target of 4,000 had been overly enthusiastic.46 By 2008, following consultation with the Office of the Third Sector, this figure had been revised down to a prediction of 2000 by June 2010.47 Yet even this reduced target seems tantalisingly far away as the rate of new membership dwindles and current numbers stand at 1,258.

Lack of membership volume has resulted in an increase in membership fees for bigger charity members but this cannot go on indefinitely. Given that severe cuts have been made to the FRSB’s marketing budget in a last-ditch attempt to balance the budget for 2010, it is unlikely that there is any more fat to trim for future years, making sustainability one of the biggest challenges facing the FRSB. Despite the Public Fundraising Regulatory Authority’s (PFRA) 2009 membership discount to any of its members that also joined the FRSB,48 the relatively small size of the PFRA at just over 127 members is unlikely to result in a massive influx of new members to the FRSB. Interestingly, the IoF, which enjoys economies of scale in this regard, has made no similar offer to its members.49 Thus, in terms

46 Hannah Jordan, Interview with Alistair Mclean, Third Sector, March 24, 2009.
47 Tania Mason, FRSB slashes marketing spend to break even by June”, Civil Society Finance, January 27, 2010 (noting, “The intention was always that the public funding tap would eventually be turned off and the organisation would be able to sustain itself through membership fees alone. But as time has gone by the organisation’s ability to be self-sustaining has never seemed certain, particularly given ex-CEO Jon Scourse’s comments in September 2008 that it would need 2,000 members by June this year in order to stand on its own two feet”) available at http://www.civilsociety.co.uk/finance/news/content/5919/frsb_slashes_marketing_spend_to_break_even_by_june(last accessed May 28, 2010). See also Gemma Ware, “FRSB needs more members to stay afloat, says Scourse” Civil Society Fundraising, August 12, 2008 (available at http://www.civilsociety.co.uk/fundraising/news/content/436/frsb_needs_more_members_to_stay_afloat_says_scourse, last accessed May 28, 2010).
48 Sarah Townsend, “Membership Deal for PFRA Members,” Third Sector, April 14, 2009 (reporting that PFRA members that joined the FRSB would receive a 50 percent reduction on their FRSB membership dues in an attempt to bolster membership rates of the FRSB.)
49 It is interesting in this regard that whereas the CEO of the FRSB was prepared to express publicly his disappointment at the low membership take-up rate amongst PFRA members, no similar public message has been relayed to IoF members who have yet to join the FRSB – see Sophie Hudson, “Fundraising Agencies open to Criticism,” Third Sector, September 21, 2010.
of the Home Office’s Criteria for Success, at present it would appear unlikely that the FRSB would be able to meet the coverage principle or the profile principle.

Coupled with issues of sustainability are equally important concerns over effectiveness. Of the FRSB’s approximately 1000 paid-up members, more than half failed to properly report the number of complaints made against them in 2009. Although the 2010 Report showed an improvement in complaint reporting, one quarter of eligible members still failed to file the necessary return in 2009/10, making it difficult for the FRSB to take effective action based on these returns. And even though since July 2008, the FRSB has amended its constitution to allow it to take action against non-members, recent engagement with charities accused of breaching the direct mail code of practice has shown that in the absence of legal or contractual enforcement powers there is very little action that the FRSB can take against these bodies, even when an outright breach is admitted. According to the 2010 Report, the FRSB received 55 non-member complaints in 2009 relating to persistent direct mail, bogus charity advertising scams and clothing collections. The FRSB assessed each complaint “informing charities, suppliers and appropriate regulatory bodies as relevant” seeking to meet with charity concerned where appropriate. However, no publicity surrounds these interventions and no successful outcomes are reported.

These issues will all cause difficulty for the FRSB when the government comes to assess its performance in 2011. Responding to a parliamentary question on ministerial regulation in the House of Lords in July 2009, Baroness Crawley commented that “the clock is ticking for self-regulation . . . Not enough charities are yet demonstrating best practice through becoming members of the Fundraising Standards Board, and if the Government have to bring in a reserve power in 2011, we may well do that.”

A further splintering of support for the FRSB has been the creation of an alternative and subscription-free fundraising code of conduct. Established in 2009, the aim of the ‘Good Fundraising Code’ is to enable all charities, regardless of ability to pay subscription fees, to adhere to best practice in the area of fundraising activity. The Good Fundraising Code is run by the Practical Fundraising Association, a trade body for Fundraisers and Fundraising Managers, and comprises four key principles, a code logo and depends entirely upon public scrutiny for effective enforcement. Since its creation in February 2009 it has attracted more than 460 signatories; a rate that, if it continues, will soon outpace the FRSB’s sign-up rate. The downside of the Good Fundraising

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51 Ibid, at 17.
52 The five-year review of the Charities Act is expected to commence in April 2011 though how this review will mesh with the recently published Charities Consolidation Bill 2011 (which makes no reference to fundraising regulation) remains to be seen.
53 Hansard, HL Deb, 8 July 2009, c665.
54 See www.practicalfundraising.com/. The growth in membership numbers here (rising by more than 100 in the past 8 months) exceeds the rate of growth at the FRSB, which rose by 35 new members only during the same time period.
Code lies in its lack of proactive monitoring and enforcement provisions\textsuperscript{55} though unless the FRSB proves sufficiently adept at effective enforcement of its codes, this difference may not be a strong distinguishing factor between the two codes.

One area in which the FRSB has made good inroads relates to the policy principle criterion. FRSB involvement in the creation of a new code on direct mailing has created an impetus for higher standards of practice and potentially greater precision in the reporting of direct mailing complaints by charities. Its highlighting of the high volume of complaints concerning data protection has also led to greater liaison with the Information Commissioner and the IoF in an effort to clarify the rules in this area. The 2010 Report provides examples of good regulatory liaison spearheaded by the FRSB, which have led to revisions to the IoF codes of practice and clarifications by the Information Commissioner’s Office.\textsuperscript{56} Finally, the FRSB’s recent introduction of guidelines on child sponsorship schemes has seen the Board, for the first time, play a lead role in policy-making as opposed simply to feeding into another body’s consultation process.

Another criterion that the FRSB meets well is the impartiality principle. Although one might consider the total exclusion of charity representatives from the FRSB Board to be an example of bureaucracy taken too far,\textsuperscript{57} the FRSB has been consistent in its adherence to the principle that ‘the control of the scheme must be independent and impartial,’ for which it must be commended. An illustration of its even handed approach to this issue can be seen in the FRSB’s 2010 treatment of a complaint against the IoF that the latter had breached its own code of professional conduct by failing to answer satisfactorily a number of questions put to it by a member of the public concerning its Outdoor Fundraising Code of Practice. The FRSB held that the complainant had made a reasonable request of the Institute and that it should provide him with the answers sought, something that the Institute subsequently did.\textsuperscript{58}

It remains to be seen whether the FRSB can remain viable for long enough to meet its regulatory goals effectively. Although its published financial accounts for the year ended June 2009 report a profit of £5,754, more than half of the

\textsuperscript{55} According to the Code creators, “The responsibility for adhering to [the code] rests with the organisation, and we can accept no responsibility for any breaches to the code. However, we will remove any organisation from our list of causes adopting the code who can be proved to have breached it and welcome members of the public to contact us with such evidence should this occur.”

\textsuperscript{56} Fundraising Standards Board, Annual Report 2010 at 3 detailing the improvements in the regulation of telephone fundraising as a result of the FRSB’s intervention and coordination.

\textsuperscript{57} See Darren Sinclair, “Self-Regulation Versus Command and Control? Beyond False Dichotomies,” (1997) 19(4) Law & Policy 529, at 545 (arguing that ‘providing industry with far greater input into the regulatory design process may be a powerful means by which to overcome regulatory resistance.’)

Board’s current income is attributable to a dwindling government grant. With the expiration of this grant fast approaching, the FRSB would seem to have three options if it wishes to break even in coming years – a) it will have to more than double its existing membership; b) it will have to seek new government grants or drastically raise membership subscriptions; or c) it will have to radically reduce its operating expenses.

II. The Emergence of a Hybrid Approach to Fundraising Regulation in Ireland

Of the 7,814 organizations enjoying charitable tax-exempt status in Ireland, there are approximately 1,899 charities separately authorised under the Scheme of Tax Relief for Donations to Eligible Charities and Other Approved Bodies. Given the advantages attached to this “eligible charity status” in terms of the charity’s ability to recover the tax paid on donated sums thereby grossing up the gift, it is a fair assumption that these 1,899 eligible charities are active fundraising organizations. The remaining 5,915 (or 76 per cent) of tax-exempt charities are more likely to be small locally-based or regional charities and although fully operative they may not engage in large scale fundraising of a type that would warrant ‘eligible charity’ status or do not qualify yet for such authorisation due to their relatively recent date of establishment. Based on a sample survey of 960 fundraising charities conducted by Trinity’s Centre for Nonprofit Management (CNM) in 2007, the CNM found that 50 percent of those surveyed reported receiving less than €13,000 in fundraised income with only 10 percent of charities in the sample reporting a fundraised income in excess of €201,274 per annum.

Combining the CNM sample survey with Revenue statistics on active fundraising charities, we might extrapolate that the Irish fundraising environment, similar to the UK scene, is one in which a relatively small proportion of large professional charities raise the lion’s share of fundraised income while the vast majority of charities engage in either piecemeal or minimal activity. Nevertheless, fundraising is one of the most visible junctures at which charities meet potential donors. One might expect that a modern legal framework for the regulation of

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60 Revenue Commissioners, List of Bodies Enjoying Charitable Tax Exempt Status under s. 207 Taxes Consolidation Act 1997, as at January 19, 2011.
61 Revenue Commissioners, List of Charities authorised at 19 January 2011 under the Scheme of Tax Relief for Donations to eligible Charities and other Approved Bodies under the terms of Section 848A Taxes Consolidation Act, 1997.
62 A charity must have been in existence for 3 years before it is eligible to apply to the Revenue Commissioners for eligible charity status.
63 Centre for Nonprofit Management, Trinity College Dublin, Exploring the Irish Fundraising Landscape (2007, ICTR). The CNM survey, however, did not control for those charities having ‘eligible charity’ status, basing their investigations solely on whether the organisation in question had a CHY number and was thus registered with Revenue for charitable tax-exemption and engaged in fundraising.
charities will address how best the state may protect donors not just at the initial moment of solicitation but also in terms of charitable accountability for application of donations to the charitable purpose for which they were sought.

The Charities Act 2009, signed into law in February 2009, represents the first serious revision of charity regulation in Ireland in almost 50 years and introduces many new features ranging from a statutory definition of charitable purpose, a register of charities, a new statutory regulator and new reporting requirements for all registered charities. The 2009 Act makes minimal reform, however, to fundraising regulation. For the most part, the underlying regulatory regime instituted by the Street and House to House Collections Act 1962 (itself a successor to the English Police, Factories & Misc Provisions Act, 1916) remains in force. Part 7 of the 2009 Act (entitled ‘Miscellaneous’), introduces limited changes to that 50-year old regime consisting mainly in the extension of the 1962 permit system to a broader constituency of fundraising activities than previously was the case, an increase in fine levels, new seizure powers for the Gardaí and new transparency requirements for collectors. Section 97 empowers the relevant Minister to regulate charitable fundraising in the interests of, inter alia, protecting donor privacy and preventing annoyance to members of the public or the making of misleading representations relating to the application of the solicited funds or the charity’s need for those funds. The explanatory memorandum to the Charities Bill however, makes clear that section 97 is intended as a reserve power that will be exercised only “should the planned Codes of Good Practice fail to achieve their intended results.”

**The Road to Mixed Regulation for Charitable Fundraising**

The road to these planned Codes of Practice began in 2006 when aware from the published draft Charities Bill of that year that the Government intended to reform the regulation of charitable solicitation with the introduction of a reserved statutory power to regulate, a charity representative body, Irish Charities Tax Research (‘ICTR’), approached the Department of Community, Rural and Gaeltacht Affairs in charge of charity law reform and asked it to plan ahead for whatever type of non-statutory fundraising regulation would ultimately be introduced. This interaction led the Department to commission ICTR to carry out a feasibility study on the best type of non-statutory regulation of fundraising. The ICTR Steering Group produced a consultation paper on fundraising in 2006 that was disseminated nationwide and discussed at regional seminars with charities and interested members of the public. International consultation with other European non-statutory fundraising regulators followed and these perspectives informed the steering group’s approach. Feedback from the consultation process resulted in the Steering

64 2009 Act, ss. 93-96.

65 See Explanatory Memorandum, Charities Bill, 2007, ss. 85. It is noteworthy that the Department expects Codes of Practice to be developed.

66 In the interests of full disclosure, the author served in a personal capacity as a member of this Steering Group.

67 ICTR, Consultation Paper on the Regulation of Fundraising by Charities through legislation and Codes of Good Practice (September, 2006).

68 Amongst the European bodies consulted in 2007 were the German Central Institute for Social Issues (DZI), the Swedish Fundraising Council, the UK Institute of Fundraising, the Dutch Central
Group’s preparation of a set of draft proposals for the regulation of fundraising, which were published in April 2007, and again were the subject of consultation in the sector.

One key recommendation arising from this second round of consultation was that the draft proposal’s suggested process for developing the Codes of Good Practice should be road-tested by convening a working group to develop a Statement of Guiding Principles for Fundraising. Composed of eight charity representatives, a representative of the Consumers Association of Ireland and two fundraising consultants, the working group produced a Statement of Guiding Principles for Fundraising in February 2008. These standards are described as ‘overarching principles’ and do not purport to constitute a detailed operational code. Parallel to the consultation procedures amongst charity representatives in Ireland, members of the steering group met with officials from the Northern Ireland Department in charge of charity law reform to keep officials abreast of developments in the Republic in the hope that an all-island approach to fundraising regulation might be developed and adopted. To date, Northern Ireland has not contributed to the cost of the FRSB and despite the presence of a rotating NICVA representative on the FRSB and a number of Northern Ireland charities signing on as members, the Department of Social Development is maintaining an informed watching brief on the development of the Irish model with a view to considering its adoption in Northern Ireland.

The ICTR Steering Group’s final feasibility report, incorporating the statement of guiding principles, was published in May 2008 and the Irish Government accepted its recommendations. In line with the recommendations, the Department of Community, Rural and Gaeltacht Affairs (as it then was) then invited ICTR to convene an Implementation Group ‘to put in place the scheme to develop Codes of Good Practice.’ The terms of reference for the Implementation Group envisaged the Group carrying out two related tasks. First, it would promote the adoption of the Statement of Guiding Principles and raise awareness of the Statement amongst donors. Second, it would identify “in consultation with the relevant charities areas of the operational and administrative aspects of fundraising suitable for Codes of Good Practice and

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69 Thirty-two written submissions were received to this consultation.
70 ICTR, Draft Proposals for the Regulation of Fundraising by Charities through legislation and Codes of Good Practice (April, 2007).
71 Thirteen written submissions were received in response to the draft proposals.
72 A draft Statement of Guiding Principles was issued in October 2007 and circulated for comment. A further national seminar was held on the draft statement and feedback of attendees was recorded in addition to which 15 written submissions were submitted and considered prior to the finalisation of the Guiding Principles in February 2008.
73 ICTR, Statement of Guiding Principles for Fundraising, 3 (February 2008).
74 ICTR, Regulation of Fundraising by charities through legislation and codes of practice (May, 2008), hereinafter referred to as the “Feasibility Report”.

Bureau on Fundraising (CBF), the Dutch Association of Fundraising Associations (VFI) and ISOBRO of Denmark.
make arrangements for the establishment of working groups to draft the codes.”

To date, the Implementation Group has worked hard at raising the profile of the Statement of Guiding Principles amongst charities, developing a list of resources to support their implementation. This online resource kit consists of FAQs for the public, a donor’s charter template, a compliance checklist for charities, a sample procedure for charities to deal with feedback and complaints and a draft public disclosure statement template for use on the websites and publicity materials of charities that sign up to the Guiding Principles. The newly named Department of Community Equality and Gaeltacht Affairs formally launched these resources in March 2010 and a year long public relations exercise to raise charities’ awareness of these resources took place.

In March 2011, ICTR launched the non-statutory regime to the general public to familiarise donors with the fundraising principles. It is expected that very shortly the establishment of an independent monitoring group will be announced with the task of “actively monitor[ing] the usage and operation of the Codes of Good Practice and to deal with complaints.” Charities will be invited shortly to sign up to the Guiding Principles online with ICTR and upon satisfying ICTR that they comply with the principles, their name will be added to the “Signed Up” list.

**The Statement of Guiding Principles versus Codes of Good Practice**

By its own admission, the Statement of Guiding Principles for Fundraising (2008) “is not intended to be a detailed operational Code; rather it presents a set of overarching principles and guidelines for fundraising in Ireland.” To this extent, the purpose of the Statement is to underpin the practices of good charitable solicitation engaged in by all charities or their agents, regardless of size or speciality. The intention of both the Government (as expressed in the Explanatory Memorandum to the Charities Bill 2007) and its non-profit partner ICTR (according to its Feasibility Report) is that the separate Codes of Practice will be developed to cover the operational and administrative aspects of fundraising by charities in order to protect the public interest. It is these codes that will then be monitored by the Monitoring Group upon its establishment. Unlike the Statement, the Codes are intended to set out a graduated approach to rules and standards by:

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75 *Ibid,* at 18.
76 Available online at [http://www.charitytaxreform.com/content/list-resources-support-implementation-statement-guiding-principles-fundraising](http://www.charitytaxreform.com/content/list-resources-support-implementation-statement-guiding-principles-fundraising) (last accessed March 19, 2010).
78 See [http://www.ictr.ie/content/sign-guiding-principles](http://www.ictr.ie/content/sign-guiding-principles) (last accessed March 31, 2011) – this page is still in test phase and thus is not yet active.
79 *Irish Charities Bill, 2007 Explanatory Memorandum,* s.85 (noting that the Ministerial power to regulate fundraising is intended as a reserve power that will be exercised only “should the planned Codes of Good Practice fail to achieve their intended results.”)
80 *Feasibility Report,* above n. 74, at 15.
81 *Ibid,* at 16.
• Restating the legal requirements on the aspects of fundraising being covered by the Code, to be followed by all charities;

• Identifying the set of standards that are regarded as appropriate and which all charities are recommended to implement;

• Identifying the set of standards that correlates to best practice and which all charities are encouraged to employ, as befits their capacity.82

By contrast, the Statement sets out the broader principles that should underpin the activities of all charities and their agents engaged in solicitation of donations. As an umbrella statement of foundational principles, the Statement subscribes to the core principles of “respect, honesty and openness.” It contains sections that set out broad-brush recommendations for charities in a) their commitment to donors; b) the conduct of their fundraisers; and c) the responsibilities of their trustees/Board/senior management. As a founding document, intended to create a framework within which codes of practice can be further developed, the Statement of Guiding Principles is a valuable document, filling a void that has long existed in the regulation of charitable fundraising in Ireland. The Statement, however, is not and was never intended to be, a ready substitute for the promised codes of practice. It contains very little precise operational guidance (since it was never intended to be an operational guide) and in this regard, it is interesting that charities to date have sought greater clarification on the granular details of actual compliance – ranging from issues relating to cash collections to new requirements relating to collections in which an emblem is given in return for a donation -- rather than on the broader principles espoused by the Statement.83

Given that any fundraising statutory requirements would be binding automatically on all charities without the need for any further implementing device, a code of practice only brings added value if it sets out the higher non-statutory standards (whether they consist of ‘ought’ or ‘should’ requirements) that go beyond the prescribed legislative baseline. Codes serve a particular use when they provide sufficient operational details to enable charity signatories to follow coherent, transparent and accountable procedures when dealing with the donating public. The legislative neglect of fundraising regulation for the past fifty years in Ireland has resulted in a dearth of effective legislative provisions, on the one hand, and an absence of practical guidance for charities regarding day-to-day solicitation operations on the other hand. Although the Statement of Guiding Principles has prepared the ground for modern regulation, there is an urgent need for the development of the actual codes of good practice if the proposed hybrid system is to stand any chance of working effectively.

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82 Ibid, at 15.
83 ICTR ran a number of regional road shows to introduce the non-statutory regimen to the broader charity sector. It also streamed webinars in 2010 and 2011 that further explained the Statement of Guiding Principles to charities and gave charities an opportunity to ask further questions about the proposed regulation and ICTR’s online fundraising ‘toolkit’ resources.
When it comes to code creation, however, Ireland suffers a disadvantage not found in the UK. Unlike the UK, Ireland has no body equivalent to the Institute of Fundraising waiting in the wings with ready-made codes to roll out for the sector. At present, two codes relating to specific fundraising practices are publicly available in Ireland, namely the Code of Practice for Direct Recruitment (developed by the Irish Fundraising Forum for Direct Recruitment) and the Code of Practice on Images and Messages (developed by Dóchas, the umbrella body for development charities). These codes are excellent in so far as they go but they deal with very specific issues. In contrast to the UK, there are no generic codes readily available relating to any of the following fundraising practices such as cash collections, direct mail, data protection, legacy fundraising, event fundraising, best practice on acceptance or refusal of donations, charity-business relationships, or supporting workplace employee donation schemes. It would be wrong to expect the Statement of Guiding Principles, developed for entirely different purposes, to be capable of speaking to these afore-mentioned issues at the level of precision necessary to enable code compliance and enforcement. In an effort to resolve this impasse the ICTR has recently produced a number of “Good Practice Factsheets” (as opposed to codes per se).\(^84\) Useful as these statements are, their standing and relationship to the Guiding Principles remains unclear. Is a charity that signs up to the Statement of Guiding Principles automatically agreeing also to abide by the ‘good practice factsheets’? Does failure to comply with the provisions of these fact sheets expose a charity to enforcement actions by the Monitoring Group? Assuming the Monitoring Group has a role in their enforcement, is it possible to discern the seriousness of the provision breached within the individual factsheets – in other words, will the Monitoring Group, like its British counterpart, pursue only breaches of ‘must’ or ‘ought’ provisions to the exclusion of ‘should’ provisions?

To date, the ICTR process has worked well because it has operated from first principles – beginning with nationwide consultation, followed up by partaking of international wisdom, backed up by both the publication of the Feasibility Study and the Statement of Guiding Principles.\(^85\) The all-inclusive nature of this consultation coupled with the steady progress made by the non-profit think-tank has been acknowledged as a model policy-making practice at European level.\(^86\) In the past year, however, there has been a subtle shift away from the Feasibility Study’s implementation recommendations. Of late, the Implementation Group has focused all of its energies on the promotion of the Statement of Guiding Principles to the apparent exclusion of the promised development of specific

\(^84\) The factsheets cover guidelines on insurance, pre-signed mass cards, data protection, garda permits, charity lotteries and guidance on handling cash and non-cash collections. Available at [http://www.ictr.ie/content/good-practice-factsheets](http://www.ictr.ie/content/good-practice-factsheets) (last accessed March 3, 2011).


\(^86\) European Centre for Not for Profit Law, Study on Recent Public and Self-Regulatory Initiatives Improving Transparency and Accountability of Non-Profit Organisations in the European Union (April, 2009). The Study notes at 22 that “Cases from . . . Ireland are featured in this Report as best practice models, especially in regard to consultations early on, when the policy approach and the concept for regulation is being developed. . . . A related matter is a more general outreach to the NPO sector and cooperation in producing best practice regulatory models, of which few examples could be found. (The most outstanding examples being Ireland and England.)”
One might argue that in the absence of the required operational codes, clearly expected by the Department, it is premature to establish the monitoring group since the expansive and less specific nature of the Statement of Guiding Principles will make it exceedingly difficult for a successful charge of breach to be maintained against any charity. Policing compliance may also prove difficult. Initially, there were no plans to maintain a publicly accessible list of charity signatories to the Statement on the basis that the ICTR did not wish to maintain such a list itself lest it give the impression that it was responsible for enforcement. Rather it was hoped that individual charities would make public their adherence to the Statement and that the Monitoring Group, once established, would engage in proactive supervision. ICTR's line of thinking on this matter has evolved recently. Plans are now underway to maintain a web-based list of Guiding Principles signatories and this move is very much to be welcomed as a step in the right direction. Room still exists for improvement, however. At present, there are no plans for a proposed kite-mark equivalent to the FRSB tick in Ireland. Such a kite-mark would enhance public recognition of the scheme since it would be immediately visible to all donors unlike the database of adherents, which depends on proactive members of the public checking up individual charities. From the state's perspective, a belt and braces approach should be encouraged since inability to access the full extent of the scheme's coverage (whether in terms of charity adherents or of charitable revenue) will make it difficult to judge the success or otherwise of the non-statutory regime.

At the other extreme is the fact that the remit of ICTR's published online resource material appears, at times, to go beyond the realm of fundraising

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87 See Jamie Smyth, "Charities introduce code to boost financial transparency," The Irish Times, March 14, 2011 and Editorial, "Regulating Charities," The Irish Times, March 15, 2011 (referring to the launch of the Statement of Guiding Principles as being the introduction of 'a voluntary code of practice' for charities.

88 The usurpation is clear from the proposed 'Compliance Checklist' contained in the ICTR online resources, which requires charities to certify in clause 6 (entitled 'Responding to Feedback and Complaints') that "the charity makes known to the Monitoring Group any requirements to update, amend or clarify the Statement or any lessons learned about the need to devise further Codes." (Emphasis added).

89 This Irish approach in this regard can be contrasted with that adopted in Canada and discussed below in Section IV. In Canada, Imagine Canada, a Canadian charity similar in mission and purpose to Irish Charity Tax Research in Ireland, provides the secretariat for the running of its Ethical Code. Imagine Canada maintains a list of all adherents, whose names it makes public. An independent body separate to Imagine Canada, known as the Ethical Code Committee, however, monitors and enforces the Code.

regulation. In its brochure “Handling Feedback and Complaints”, ICTR provides a template for charities regarding complaints that reads in part: “If you do have a complaint about any aspect of our work, you can contact [named office holder in organisation] in writing or by telephone.” The brochure goes on to inform the public that unsuccessful resolution of such submitted complaints ultimately could be referred to the Monitoring Group. Although this is perfectly correct in the context of complaints regarding fundraising activity, no distinction is drawn between fundraising and any other activity of the charity over which the proposed Monitoring Group will have no jurisdiction.

Similarly, the Irish model places a great emphasis on accountability, not so much in the pure context of fundraising but in the broader scheme of financial accountability. The ICTR Compliance Checklist requires charities to certify that policies are in place to deal with allocation of funds raised, with any shortfall or excess of income and for ensuring third party fundraiser compliance with the Statement of Guiding Principles. Moreover, charities are required to clarify whether they have an organisational independence policy in place and to confirm that financial statements and annual reports comply with the Charities Act 2009 and that such financial statements satisfy the appropriate audit/examination requirement. A further requirement is that charities confirm that they ‘have a system in place to ensure that all donations are tracked and recorded.’ No further explanation is provided of this requirement so the extent of this provision is unclear. What does tracking a donation entail? If a charity is engaged in a street collection, what level of tracking is required? Does such recording relate only to the cumulative total raised or to individual donations and must the charity be able to trace this money through to actual expenditure? If such funds are not ring-fenced, does this impose a new requirement on charities to itemise such expenditure? Interestingly, there is no reference to this requirement in the Statement of Guiding Principles, making it difficult to see how failure to observe it could be enforced even against those bodies signing up to the Statement.

**Emerging Issues for Fundraising Regulation in Ireland: Key Challenges from a Structural Perspective**

Structurally, the basis for the Irish regime is more precarious than its UK counterpart. The absence of a body equivalent to the Institute of Fundraising means that there is no ready-made code making body in Ireland. To date, the Implementation Group has not convened a code drafting working group, making the non-statutory regime a rudderless one. As established, the Implementation Group, the secretariat of which is housed in the ICTR, was intended as a transitional body and not one of permanent duration. If the Implementation

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92 The explanatory footnote to this unusually named policy reads “Where a charity receives gifts from named and/or anonymous donors of a size that could be construed as having the potential to influence the independence of the organisation’s decision-making then these should be disclosed in the Annual Report and Financial Statements.” It is unclear beyond such disclosure what any such policy should contain.
Group is discontinued it is unclear what body will have the power to convene a code-making working group.

At present, therefore, Irish charities are invited to sign up the statement of the Guiding Principles on Fundraising rather than joining a best practice body such as the IoF or the FRSB. Administratively, this process is cumbersome. Instead of being a member of a body and therefore bound by all its codes that affect your operations, under this regime it would seem that charities are signatories only to the Statement, and any future operational Codes issued would also require repeated charity acceptance and endorsement. This may well affect both the effective rollout and ultimate sustainability of the regime. It will also undermine the use of any future kite-mark to illustrate adherence. If each code requires individual endorsement, charities may end up resembling high achieving boy-scouts with a collection of logos pinned to their websites.

Sustainability, in the broader sense, is a challenge that the Irish model will share with the UK model. This problem, if anything, will be more pronounced in Ireland since there are currently no plans in Ireland to charge charities or fundraisers for signing up to the Statement of Guiding Principles. In the absence of a subscription fee, the scheme will be entirely dependent upon indefinite State funding not only to administer the scheme but also to fund the drafting and revision of codes, to monitor charities and oversee the complaints procedure and to promote awareness of scheme amongst charities and donors alike.

The absence of financial contribution by charities will deny the regime both an additional source of income and a contractual basis to the relationship between the monitoring body and the charity signatories. Breach of the Statement and any future codes will thus not constitute a breach of contract but merely breach of a voluntary undertaking, making enforcement technically more difficult since it will a lack both a legally enforceable sanction and a sufficient incentive to otherwise voluntarily comply. On the other hand, the absence of a subscription fee may make it more attractive to sign up to the Irish statement in the first instance, as demonstrated by the Good Fundraising Code’s experience in the UK. Thus, depending upon public awareness (which itself will be contingent on public funding), the issue of coverage may not be such an issue in Ireland as it has proved to be in Great Britain.

A final set of structural difficulties relate to the failure of the Charities Act 2009 to modernise the 1962 regulatory framework for public collections. As noted previously, the 2009 Act extends the existing 1962 statutory permit regime for cash collections to non-cash collections. Practically, this expansion of jurisdiction will put great pressure on the permit providers – An Garda Síochána – to grant and oversee permits for a wider variety of non-profit organisations. Yet, it remains the case that there is no nationwide central diary database for allocating collection dates or venues nor is there any public guidance available from An Garda by way of manual or other publication that outlines the process.
for obtaining permits or conditions that may be attached to them. It is not possible with the making of one application to receive a nationwide permit to collect on the one day and since individual Garda districts run their fundraising calendars on different basis – running from calendar months, weeks per month, weeks per year – coordinating a national fundraiser is cumbersome and presents its own difficulties for new charity entrants seeking to secure a fundraising date.

Emerging Issues for Fundraising Regulation in Ireland: Key Challenges from a Legal Perspective

Even as the ICTR resource kit is rolled out in Ireland, there are a number of emerging legal challenges that will have to be faced before any non-statutory regulation regime can be deemed a success. First, the non-statutory regime must work alongside an archaic regulatory regime for the granting and supervision of public collection permits. Under the Street and House to House Collection Act 1962, a charity wishing to hold a public collection must obtain a permit from the Garda Chief Superintendent for the locality where the collection is to take place. It is an offence to hold an unauthorised collection but the licensing Garda enjoys only limited grounds to refuse a permit request. Under the existing permit system, applicants are required to provide only minimal information about themselves and their organisations. There is no statutory obligation on charities to report the outcome of their public collection activities or to account for the subsequent expenditure of those publicly raised funds. Enforcement under the 1962 Act is left to the initiative of the Gardai and is not monitored or reviewed on a countrywide basis nor is there any published annual review of its effectiveness. There are known difficulties with the interpretation of what constitutes a ‘public place’ for the purpose of the existing statutory regime and with the actual implementation of the existing permit system that will cause practical problems when this regime is extended to cover all other types of public fundraising.

Enforcement will thus be a major issue since the proposed non-statutory regime lacks both contractual and legal sanctions. Compliance is purely peer-enforced and voluntary. Although it is intended to establish the Monitoring Group to oversee the non-existent operational codes, lack of specificity in the Guiding Principles will make it extremely difficult for the Group to uphold any complaint received against a signatory, particularly in light of the ‘comply or explain’ provisions. Aside from the argument, made above, that it is premature to establish a Monitoring Group before developing operational codes of practice it remains the case that when established, the Monitoring Group (like its English counterpart) may receive many complaints against charities or fundraising

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93 As part of its non-statutory fundraising regulation project, the author understands that ICTR, in conjunction with Focus Ireland, hopes to offer guidance on the public collections permit application process in the form of a ‘fact sheet’ over the coming months.

94 1962 Act, s.6.

95 1962 Act, ss. 3-4. Section 9 provides that a refusal may be made 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.

agencies that are non-signatories. As yet, no details have been forthcoming as to whether or how it is intended to enforce the Statement against such non-participants.

III. The Transplantation of Knowledge: what can Ireland learn from the UK experience?

Despite the many common ties between Ireland and Great Britain, there is a world of difference when it comes to charity law enforcement. For the best part of 50 years, the Charity Commission for England and Wales has not only maintained the register of charities in England but it has provided a focal point for the preservation of charitable assets and the enforcement of charity law. This enforcement, however, did not extend to the regulation of fundraising. Thus, the English experience of regulating charitable solicitation has developed more recently, growing out of the statutory mistakes of the 1990’s and evolving into the current self-regulation regime.

The English regime enjoys a number of advantages that do not exist in the case of Ireland: first, the existence of a well developed charity regulatory system is a definite plus since it is one less issue with which British policymakers have to contend. Second, the fact that the FRSB has had five years of guaranteed seed funding must also be seen as a plus. Although this funding is now expiring, its existence allowed the FRSB the opportunity to grow, to raise its profile and to establish its protocols and procedures. In contrast, there is no long-term commitment by the Irish government to fund the non-statutory regime at any particular level. Such an absence of detail makes it difficult to plan for sustainability. Third, although the current level of subscription funding is seen as inadequate to fund the cost of the non-statutory scheme in Great Britain, the absence of any provision for charity subscriptions in Ireland will only serve to further undermine the viability of the scheme, particularly in light of the precarious nature of government funding.

Fourth, the presence of the Institute of Fundraising in the UK and its development of the various fundraising codes of conduct give a massive fillip to the British non-statutory scheme. These ready-made best practice guidelines are essential to the implementation of a non-statutory scheme and, as will soon be realised in Ireland, one cannot proceed effectively in their absence. Yet, the costs and resources associated with their creation should not be under-estimated and it is more than likely that a cut in Departmental funding is at the root of their mysterious disappearance from the Irish model. The fact that the IoF enjoys a paid-up membership base in excess of 5,000 members means that funding exists to continue to update the codes and develop new ones when necessary. Finally, from a regulatory perspective, the creation by the Home Office of the Indicators of Success provides an objective checklist against which to benchmark the work of the FRSB. The Irish Government has set no similar expectations of the ICTR scheme. There are no public criteria, which if not met, will result in the Minister exercising his statutory powers to regulate the sector, a regrettable feature which is unlikely to aid informed decision-making at a later stage. To be sure, it
remains to be seen how rigorously the Home Office indicators will be applied in the UK but absolute silence as to your success norms is unlikely to result in any better review.

Even with these five advantages, however, the British regime, as outlined above is not free from difficulty. The current British statutory framework for fundraising regulation, like its Irish counterpart, is past its sell-by date. Part III of the Charities Act 2006 – which establishes a new statutory regime for licensing public collections – has not been commenced leaving charities subject to regulatory regimes conceived in 1916 and 1939, respectively. Of greater concern is the fact that the recently published Charities Consolidation Bill 2011 contains no provisions on fundraising regulation, giving rise to a justifiable fear that such silence will translate once more to legislative and political inaction.

Aside from the legislative difficulties, the presence of codes per se does not make a non-statutory regime successful. As with all self-regulation and non-statutory regimes, the scheme will only be as good as its enforcement and compliance record. The FRSB is clear as to its remit to hear complaints. According to its website, it will only uphold a complaint made against a member if it relates to a ‘must’ or ‘ought’ regulation contained in the Institute’s Codes of Fundraising Practice, or if it is a breach of the Fundraising Promise (the equivalent of the Irish Donor’s Charter). If a charity or fundraiser breaches a ‘should’ requirement (indicating a best practice criterion), the FRSB states that it “will not legislate based on these guidelines, unless there are exceptional circumstances. However, it is still important for charities to report and refer complaints to us that are about a breach of a 'should’ guideline in a Code, so that we can monitor the effectiveness of them.” This is a lesson that the Irish Implementation Group needs to take on board. Unless there is greater clarity for the proposed Monitoring Group, it will be extremely difficult for the Monitoring Group’s members, the general public and fundraising charities to know whether the conduct in question has crossed the line of acceptability under the Irish scheme. The status of the Best Practice Factsheets in particular needs to be clarified as a matter of urgency in this regard.

Even with clear and specific rules regarding compliance, unless there is effective enforcement, non-statutory regimes may be perceived as lacking the essential deterrence factor. To date, the FRSB has adjudicated on four complaints against charities – the first in June 2007 against Cancer Research UK for breach of the Fundraising Promise (as opposed to a particular IoF Code) in respect of the frequency of direct mailings to a member of the public. Rejecting the complaint, the FRSB held that by sending nine pens to the complainant within a two-year period, Cancer Research UK’s conduct did not amount to unreasonable nuisance or disruption and neither did it indicate that Cancer Research UK was not committed to high standards. Cancer Research UK came up for scrutiny again in 2010 in relation to its organisation of a fundraising event, Race for Life, which

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98 See http://www.frsb.org.uk/content/adjudication-item/2 (last accessed May 4, 2010).
is only open to female competitors. A disappointed male contestant unsuccessfully argued that the charity’s stance breached the Equality Act 2010.

In September 2008 UNICEF found itself charged with a breach of both the Fundraising Promise and the Accountability & Transparency in Fundraising Code in respect of alleged exaggerated claims of vaccination efficacy in a child immunisation appeal. Unhappy with the explanations offered by UNICEF and its refusal to amend the advertisement, the complainant sought a ruling by the FRSB. The Board found that there were “parts of the leaflet which could be construed by readers as exaggeration, although in the Board’s view there was no intent to mislead, and the average member of the public would not be likely to be misled.”99 At this stage of proceedings, UNICEF agreed to modify the wording of its appeal and in light of this modification, the FRSB deemed that the action was informally resolved with there being no further need for action on its part. The outcome here is of interest since at Stage 3 the only two options open to the FRSB, according to its own procedures,100 are either to accept or reject the complaint. UNICEF’s belated agreement to amend its advertisement (something it had failed to do at the Stage 2 hearing) appears to have saved it from a decision against it.

The only formal FRSB upholding of a complaint to date has been against the charity, Painted Children. Following numerous complaints by members of the public, former employees, other charities and a fundraising regulatory body, the FRSB ruled that the charity had engaged repeatedly in unlicensed and illegal street collections and had thus breached both the Fundraising Promise and the Police, Factories (Miscellaneous Provisions) Act 1916. It revoked FRSB membership and informed both the Charity Commission and the Metropolitan Police of its findings, recommending further investigation of the charity’s activities. The FRSB also recommended that the IoF should consider drafting a Cash Collections Code which would provide more formal guidance than is currently available and consolidate it under one code. Painted Children was given the option of undergoing a one-year monitoring with regards to its fundraising practices with the proviso that if it remained compliant for one full year, the FRSB would publicise its progress and consider the charity for membership reinstatement. The charity has responded positively to this offer.101

99 See http://www.frsb.org.uk/content/adjudication-item/3 (last accessed May 4, 2010). Section 6.1 of the Accountability & Transparency in Fundraising Code, relating to Fundraising Materials, states that charities "should think carefully about fundraising requests, statements and examples that are used on marketing materials and ought not to mislead." The Fundraising Promise provides: "We are honest and open" taking into account the commitment "we tell the truth and do not exaggerate."


101 See the charity’s statement on its website at http://www.paintedchildren.co.uk/en/wha-do/news/114-frsb-judgement (to the effect that, "Painted Children hugely regrets the judgement made by the FRSB, we would like to assure everybody that we are working very closely with the FRSB over the next 12 months, to ensure that we raise funds in compliance with their rules and regulations. We endeavour now to demonstrate to all possible that we are an open and honest charity, and we aim to make the lives better for those who live with very much struggle, in Asia and here in London too.")
A bigger problem for the FRSB has arisen in relation to non-members. Having only 1,258 signatories to the Fundraising Promise lessens the FRSB’s moral authority when it comes to enforcement. It recently changed its policy to allow it to police non-member organisations. These non-members may fall into one of two categories – those organisations that are neither members of the FRSB nor of the IoF and those that are not members of the FRSB but are members of the IoF. In the former case, the FRSB would seem to have little control over those organisations other than the ability to name and shame – an ability that will be greatly hampered by the recent cuts made to the FRSB’s publicity budget. In the latter case, one might imagine that the FRSB would be able to exercise more control over the conduct of these defaulters but it appears that only FRSB members can be subject to the three-stage complaint resolution process.

In practice, the FRSB seems reluctant to take dispositive action in relation to either category. In March 2010, the FRSB began meeting with representatives of eight charities identified as having breached the IoF Code on Direct Mail. To date, two of those eight organisations deny that they have breached the code and neither of these organisations committed either to changing their practices or to joining the FRSB as a result of the meetings.102 The FRSB has not exercised its option to ‘name and shame’ in these instances. The IoF, for its part, has not revealed whether any of the referred charities belong to it, making it difficult to assess whether the IoF has influence over its own members in terms of code compliance. What is clear is that the ability to deal with non-members is an issue with which the Irish Monitoring Group will also have to grapple. This problem is likely to be exacerbated in the absence of clear codes of conduct that identify with some precision the type of conduct that is required (by law) or expected (of code members).

IV. The Remaining Challenges – Finding Wisdom in other Jurisdictions.

In light of the difficulties that beset both regimes, it is useful to look at the experience of other jurisdictions that have turned their attention to the non-statutory regulation of charitable fundraising. One interesting comparator in this regard is the Netherlands. Like Ireland, the Dutch legal system does not strictly regulate fund-raising activities and there is no requirement under Dutch tax law for an exempt organisation to publish annual reports or other financial information.103 Of an estimated 400 active fund-raising charities, 200 are accredited under the Dutch Central Bureau on Fundraising (‘CFB’). Accreditation must be renewed every three years and accredited charities are required to meet a number of conditions before they can use the CBF’s seal on their documentation.104 In particular, members pledge that not more than 25 per cent

102 Kaye Wiggins, “We didn’t break your direct mail rules, accused charities tell Fundraising Standards Board,” Third Sector, 9 March 2010.
104 Central Bureau on Fundraising, Objectives and Tasks (Amsterdam, January 2009) at 6. According to its Objectives and Tasks document, such accreditation does not come cheaply. The
of all acquired funds will be spent on costs to acquire those funds; members must prepare a policy plan setting out the organisation’s activities and a clear description of expenses and an evaluation of this report must be published along with an annual report in line with the CBF criteria outlining costs and including an accountant’s report. The CBF monitors these reports. Accredited organisations are required to appoint five independent unpaid volunteers to their boards and the organisation must abide by the complaint procedure of the CBF. Since the launch of the accreditation scheme in 2000, charity and public recognition of the scheme has grown. In 2003, the CBF scheme accounted for 50 percent of fundraising charities that in turn accounted for a staggering 90 percent of the total fund-raising market in the Netherlands.

An alternative approach to fundraising regulation is provided for in Canada. The Canadian regulatory regime comprises both quantitative and qualitative evaluation by its revenue authority in addition to a voluntary ethical code developed by Imagine Canada in 1998 and updated in 2008. The latter code, “The Ethical Fundraising and Financial Accountability Code” covers over 240 charity members who collectively account for more than Can $1.7 billion in fundraising revenue each year. Compliance with the code is monitored by an independent arms-length committee, the Ethical Code Committee, comprising of experts in the areas of financial reporting and fundraising. The Committee has the power to dismiss a complaint, require a charity to undertake an education programme, issue a warning to a charity, withdraw its logo from a non-compliant charity and/or make the name of the errant charity publicly available. The re-launch of the Ethical Code Program in 2008 meant that there was no data on the level of reported complaints or disciplinary actions for code breach reported in the first annual progress report for 2008/09. The 2009 progress report revealed that 80 percent of members reported receiving no complaints and of those receiving complaints the median number reported was 17. A spokesperson for the Ethical Code Program admitted that there had been some difficulties encountered in the reporting process to date primarily concerning the definition of ‘complaint’. As a result of this, the reporting cost of the assessment is a one-off fee of €5,560, plus an annual contribution that is related to the revenues from the institution’s own fundraising, and that ranges from €425 to €8,440 per year (fees for 2009). The fees are adjusted on a yearly basis, and are linked to the wage index figure ‘CAO - lonen en contractuele arbeidsduur’ (collective agreement - wages and contractual working hours). A cheaper option available to institutions that have been involved in fundraising for less than three years and small institutions with revenues from fundraising that do not exceed €120,000 per year is to apply for a Certificate of no Objection, for which the fee for assessment is €830.

105 Ibid, at 601.
106 Ibid, at 602.
107 Imagine Canada, In Charity We Trust – Year in Review, Ethical Code Supplemental Report (June 2010) available at http://www.imaginecanada.ca/node/191. Membership of the Ethical Code has increased from 175 members at the end of 2008 to the current 243 members as at June 2010. The Canadian experience shows that 43 percent of members report fundraising revenues in excess of $1 million pa, compared to just 3 percent of all registered charities – see In Charity We Trust, 2.
109 Author correspondence with Karen Alebon, Program Officer, Ethical Code, Imagine Canada, June 3, 2010. This fact was confirmed in the subsequent 2009 Annual Progress Report, 2.
process is currently being revised. With the establishment of a Voluntary Sectors Standards Forum (VSSF) in 2010, it is anticipated that the fundraising code will be incorporated into a broader framework of non-statutory standards that will overtime be developed by non-profit organisations to govern their activities.\textsuperscript{110} The VSSF proposals envisage the establishment of an Independent Accreditation Committee to make recommendations on the interpretation of and non-compliance with the Code. There are also plans to enter into dialogue with the Canada Revenue Agency (CRA) regarding its support for the initiative.\textsuperscript{111}

The CRA already plays an important role in the regulation of charitable fundraising in Canada. In 2009, it updated its guidance on charitable fundraising practices.\textsuperscript{112} Under the revised guidance, the CRA adopts a quantitative test for evaluating fundraising expenditures to the effect that an activity is considered to be charitable rather than a fundraising activity if “substantially all” of the activity advances an objective other than fundraising. The CRA places the ‘substantially all’ threshold at a figure of 90 percent. If a charity meets this threshold then all associated expenditure with the activity may be allocated as charitable or other non-fundraising expenditure.\textsuperscript{113} This test assumes significance in light of CRA’s related procedures for assessing the legitimacy of fundraising. According to the 2009 guidance, the CRA advocates that a ratio of fundraising expenses to fundraising revenue of below 35 percent normally will not generate concern; a ratio of 35 percent and above will lead the CRA to assess more carefully the expenditures of the charity in question while a ratio of 70 percent or above “will raise concerns with the CRA” which will then force the charity to explain the reasons for its high expense levels. Failure to provide an adequate explanation to the CRA’s satisfaction will result in a finding that the charity is not in compliance with the CRA’s guidance statement. The test, however, is not solely quantitative since the CRA states in its guidance that in applying the above ratios it will take account of qualitative factors including the size of the charity, whether the cause has a limited appeal and the extent to which the charity complies with an array of indicative best practices in its fundraising activities. Paragraphs 10 and 11 of the CRA guidance list both indicative non-exhaustive best practices and an array of activities of concern that would lead to further assessment by the CRA.\textsuperscript{114} These practices are further expanded upon in

\textsuperscript{110} Ensuring Excellence: Standards and Accreditation for Canada’s Voluntary Sector, A Proposal to Implement Voluntary Standards of Excellence in Canada’s Voluntary Sector, 10 (July 2009).

\textsuperscript{111} Ibid, at 17.


\textsuperscript{113} An alternative test advanced by the CRA that allows a charity to categorise expenditure as non-fundraising relating is referred to as ‘the four part test’ under which a charity that prove that: a) the main objective of the activity was not fundraising; b) the activity did not include repeated requests, ongoing solicitations or other fundraising merchandise; c) the audience was not selected because of their ability to give; and d) payment of commission or compensation was not tied to the amount of donations received, then the activity will not constitute fundraising. See n. 112 at par. 8(b).

\textsuperscript{114} See n. 112 above, at [10] and [11]. Areas covered by the best practice guidelines include: management and supervision of fundraising practice; adequate evaluation processes and disclosure of fundraising costs, revenues and practice. Practices likely to draw the attention of the CRA and warrant further investigation include: fundraising initiatives or arrangements that are not well-documented; activities where most of the gross revenues go to contracted non-
additional supplementary CRA guidance.\textsuperscript{115} It is at this point that the CRA procedures best approximate those currently in place in the UK and proposed for Ireland. The Canadian indicators of best practices are clearly written in declarative language, leaving little room for doubt as to what constitutes required practice and what is viewed as recommended behaviour.\textsuperscript{116}

The advantage that the Canadian process has over the UK and Ireland, at least in theory, is that the CRA has more institutional weight when it comes to sanctioning bodies for non-compliance than independent bodies enjoy. Thus, in relation to enforcement for non-compliance with fundraising requirements, the CRA Guidance provides that:

\begin{quote}
[T]he CRA uses a series of progressive compliance measures. In some cases of non-compliance, the CRA uses education letters or compliance agreements. The CRA can also impose a monetary penalty, suspend a charity's tax-receipting privileges, or revoke a charity's registered status. Although revocation is generally the last resort, the \textit{Income Tax Act} allows revocation at any time—when it is appropriate to the circumstances.\textsuperscript{117}
\end{quote}

A final jurisdiction of note in this regard is the United States. Following on from the Senate Finance Committee’s interest in non-profit organisational practices in 2004, a non-profit sector representative body, Independent Sector, at the invitation of Senator Grassley, set up the Panel on the Nonprofit Sector to make recommendations to improve governance and accountability standards in the sector, thereby forestalling the need for Congress to legislate for such change. The Panel produced two reports on the sector between 2005\textsuperscript{118} and 2006\textsuperscript{119} in addition to a handbook for charities on the principles for good governance and ethical practice in 2007.\textsuperscript{120}

\textsuperscript{115} Canada Revenue Agency, \textit{Additional information on Guidance CPS-028, Fundraising by Registered Charities}, available at \url{http://www.cra-arc.gc.ca/tx/chrts/plcy/cps/cps-028-ddn-eng.html#d19} (last accessed May 31, 2010).

\textsuperscript{116} \textit{Ibid} (for instance, in relation to prudent planning processes, the indicators provide, “A registered charity's fundraising planning costs should be reasonable and proportionate to the types and scope of activity it intends to carry out. Before undertaking fundraising, the registered charity should: familiarize itself with any regulatory obligations for the type(s) of fundraising it is considering; and research costs and returns that can be expected based on the types and scope of fundraising being undertaken, and investigate other potential fundraising methods. Based on this research, the charity should select the best fundraising approach or approaches for its fundraising goals, resources, and the expected ratio of net proceeds.”)

\textsuperscript{117} See above, n. 112.

\textsuperscript{118} Panel on the Nonprofit Sector, “Strengthening Transparency, Governance, and Accountability of Charitable Organizations,” (June 2005).


The Principles for Good Governance and Ethical Practice resulted from the deliberations of the Panel on the Nonprofit Sector on a series of recommendations made to it by its Advisory Committee on Self Regulation. Established in April 2006, the Advisory Committee, co-chaired by Professor Joel Fleishman, Duke University and Rebecca Rimmel, President of Pew Charitable Trusts was further assisted in its work by the existence of two commissioned studies – one by Professor Harvey Dale of the National Center on Philanthropy and the Law, reviewing existing models of self-regulation in the sector\(^{121}\) and the other by the Farkes Duffett Research Group, examining current issues that arise in the context of self-regulation regimes.\(^{122}\)

The Principles handbook devotes one of its four sections to “Responsible Fundraising.” This section lays down seven principles that organisations soliciting funds from the general public should follow to build donor trust and confidence. These principles cover prohibitions on commission or percentage based fees for solicitors, and on sales of donor contact details. Charities are also required to supervise and train fundraisers appropriately and ensure that donors are not subject to intimidation or coercion; to ensure that donations are used as directed by donors and that specific acknowledgement for contributions made in accordance with IRS rules is given to donors. Finally, there is an exhortation that solicitation materials must be accurate and truthful and clearly identify the relevant organisation involved.

The fundraising principles are of average quality. They lack the precision of the Canadian and UK codes, which clearly distinguish obligatory legal requirements from best practice requirements. In this regard, the American principles are closer in content to the Irish principles. However, in structure the American principles fall short of even the Irish model since there is no attempt to develop a supervisory or enforcement regime to ensure compliance with any of the principles promulgated. The decision to adopt a self-regulatory regime that is entirely lacking in a compliance mechanism flies in the face of the advice of the experts consulted. In his report to the Advisory Committee on Self Regulation, Professor Dale noted:

\[\text{[P]}\]robably the single most significant factor contributing to the effectiveness of any self-regulatory model is legal enforceability of its standards. . . Short of legally enforceable sanctions, a self-regulatory system with other meaningful sanctions may also be quite powerful. The best example is the authority to accredit organizations coupled with the authority to withdraw the accreditation, when the accreditation is required either (1) to enable to the organization to engage in the activities for which it is formed (monopoly power) or (2) for funding by

\(^{121}\) See Harvey Dale, “Study on Models of Self-Regulation in the Nonprofit Sector” in *Principles for Good Governance*, above n. 120.

\(^{122}\) Ibid (concluding that the most effective self regulation regimes share three common elements – industry developed standards; sufficient resources to assist organisations to meet the imposed standards; and a system of recognition that rewards those groups that comply and penalises those groups that do not.)
government and private grant makers (ability to market to funders).

It would appear that the Advisory Committee took this perspective to heart and advocated strongly in its recommendations to the Panel on the Nonprofit Sector that a compliance regime should be included. Although the deliberations of the Advisory Committee were not made public, one of its co-chairs subsequently revealed that the Committee had voted overwhelmingly in favour of the inclusion of a monitoring mechanism on three separate occasions. Favouring ‘gentle coercion’ over merely the persuasive merit of unsupported principles, Professor Fleishman felt compelled to write of his disappointment at the Panel’s rejection of the compliance element of the Committee’s recommendations. In his summary of the Panel’s shortcomings in this regard, Fleishman puts the matter succinctly:

I think that the Panel succeeded in representing the nonprofit sector to the government in this instance, but failed adequately to represent the government to the nonprofit sector by its unwillingness to exercise courage in leading and persuading the nonprofit sector to take meaningful steps in regulating itself. The proclamation of principles of ethical behavior is unquestionably an important first step in self-regulation, but, without any mechanisms for compliance encouragement, monitoring and reporting, the Principles alone hardly constitute any convincing definition of “self-regulation.”

According to Fleishman, the Panel made a trade-off between a model incorporating a compliance inducing entity that did not enjoy the full support of some influential non-profits and a model forgoing any attempt at compliance inducement that was more acceptable to these latter organisations. Indeed, in an open letter to Independent Sector prior to its deliberations on the Advisory Committee’s recommendations, the Philanthropy Roundtable, a national association representing individual philanthropists, private, community and corporate foundations and donor advised funds that contribute at least $50,000 annually to charitable causes, publicly decried the need for any type of enforcement mechanism. If the Panel’s decision to depart from the recommendations of the Advisory Committee regarding compliance was made in the hopes of encouraging bodies like the Philanthropy Roundtable to sign up to

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123 See n. 120 above, at 127-128.
125 Ibid, at 6.
126 Ibid, at 11.
127 Open letter from Adam Meyerson, President of Philanthropy Roundtable to Independent Sector, February 2007 (stating, “while foundations should be free to participate in voluntary accreditation or certification programs if they wish, the Roundtable is strongly opposed to any requirement that accreditation be a condition of tax-exempt status. An accreditation requirement could pose a very serious threat to independent thought in philanthropic foundations.”). Cited in Fleishman, n. 124 above, Appendix D. Also available at http://www.philanthropyroundtable.org/content.asp?contentid=720 (last accessed June 9, 2010).
the Principles, such hope was short lived. On November 1, 2007, one month after the publication of the Panel’s Principles, the Roundtable issued a public statement rejecting the principles as a whole and encouraging its members to be cautious about their adoption “lest they allow others to convey the impression that there is a widespread consensus for all of its recommendations.” 128 Thus the Panel’s weakening of the self-regulation principles recommended by the Advisory Committee in an effort to accommodate all organisations did not in the end ensure broader support from those critical of the need for such regulation in the first instance.

So, what may be gleaned from the experiences of the Netherlands, Canada and the United States when it comes to the regulation of charitable fundraising? Legrand once observed that “unless the comparatist can learn to think of law as a culturally-situated phenomenon and accept that law lives in a profound way within a culture-specific – and therefore contingent – discourse, comparison rapidly becomes a pointless venture.” 129 Bearing this viewpoint in mind, it may be said that of the three systems the Dutch and Canadian models appear to work better than the US model. The first factor contributing to this greater effectiveness in the Netherlands and Canada is the collective engagement of the nonprofit sector in the regulatory projects. In the Netherlands, almost all charities are existing members of the CBF although only 50 percent are accredited. Similarly, in Canada even though just over 300 charities are currently subject to the Ethical Code Program all charities are subject to the CRA’s regulation of solicitation. In both instances there is therefore a solid basis for regulation. In contrast the US (like Ireland and the UK) does not enjoy a ready-made constituency of charities signed up and awaiting regulation, but must instead build the need amongst the sector to adopt such practices voluntarily. 130

A second advantage enjoyed by the Canadian and Dutch regimes is the existence of clear and strict standards that facilitate both compliance and enforcement. As noted by Dale in the context of the US study, “the specificity of standards is . . . a factor influencing self-regulatory effectiveness” because “the broader the coverage of the standards—in substance or applicability — the greater the risk that they may be seen as overly general, perceived as “soft” and perhaps even irrelevant, and given merely lip service.” 131 A related boon to enforcement lies in the fact that under the Dutch system accredited charities are monitored on a

130 Bekkers predicted that the lack of a captive audience in this regard would constitute a disadvantage for the US if it tried to import a Dutch-style self-regulatory regime. See Bekkers n. 103 above, at 611.
yearly basis and must be reaccredited by the CBF every three years\textsuperscript{132} whereas in Canada the Ethical Code Program proposes biennial re-accreditation. This re-evaluative process provides an opportunity to ensure that members continue to subscribe to the values of the regulatory scheme on an ongoing basis.

A third factor facilitating the successful implementation of the Dutch regime is the effective publicity of the self-regulatory scheme through the mass media. As Bekkers notes, “The only way an accreditation system can work effectively is when the public knows about the initiative.”\textsuperscript{133} In non-statutory regimes, particularly those in which there is no legal sanction for non-participation, peer pressure from the donating public or private or public funders may be the required bait to encourage a charity to sign up to a code of conduct or accreditation system. Given the general inclination towards passivity on the part of public donors when it comes to policing beneficiary organizations,\textsuperscript{134} a regulatory regime unsupported by comprehensive publicity will face difficulties. Notwithstanding the Dutch emphasis on publicity, a high public profile is not guaranteed overnight but requires constant reiteration over time.\textsuperscript{135} Given the massive cut in the FRSB’s budget for 2010 and the as yet uncommitted budget towards support of the non-statutory regime in Ireland, publicity, and hence profile, will take even longer to build.

A fourth distinguishing factor of the Canadian and Dutch models is the fee charged to charities that wish to associate themselves. The fee to join the Canadian Ethical Code Program is a two-year subscription based on annual revenue from fundraising and earned income (but excluding government funding) that starts at $100 for an organisation with revenue of less than $100,000 rising to $4,000 for an organisation with annual revenue in excess of $100 million. In the Netherlands charities pay an accreditation fee of €5,560 along with an annual subscription fee based on a wage index figure that ranges from €425 to €8440 per annum.\textsuperscript{136} An organisation wishing to renew its seal of approval at the end of the three-year period is required to be re-assessed and would presumably incur another accreditation fee. It would seem, therefore, that the Dutch system, in particular, comes at a price. There does not seem to be a reduction in the accreditation fee based on size of organisation and the yearly fees are currently higher than those charged in the UK, thus aiding in sustainability.

\textsuperscript{132} Central Bureau on Fundraising. \textit{Objectives and Tasks} (January 2009) at 6.
\textsuperscript{133} See Bekkers n. 103 above, at 612.
\textsuperscript{135} See Bekkers, n. 103 above, at 612 (noting that three years after its launch and despite a high level of publicity less than a third of donating households were aware of the CBF seal of approval).
\textsuperscript{136} See n. 132 above, at 6. Figures quoted are figures for 2009.
Conclusion: A Tentative Policymaker’s Checklist.

To return then to the question posed at the start of this article – how should one measure the success of a non-statutory regime for the regulation of charitable fundraising? When should the state be prepared to exercise its statutory power to regulate? What factors most influence the choice between a statutory and non-statutory regime? To some degree, in answering these questions, it is useful to turn one’s attention to the intended audience and more specifically to that audience’s receptiveness to regulation. In this regard, one could identify at least four separate categories of charitable organisations when it comes to their openness to regulation, namely:

a) **Well-intentioned and well-informed charities** – these organisations may generally constitute the larger professionally run charities that are well-disposed to comply with the regulatory regime though do not always deliver on their promises without some nudging by the regulator.

b) **Well-intentioned and ill-informed charities** -- these organisations are more likely to be small or medium sized entities with some or no paid staff and who rely on volunteers to a greater extent. Their heart is in the right place but lack of resources (both financial and human) means that the latest best practices take longer to filter down to these organisations and priorities for the charity in terms of charitable mission and most often fundraising mean that governance and regulatory concerns figure lower on the list of priorities.

c) **Ill-intentioned and ill-informed charities** -- these organisations fall into this category either because of their attitude towards and/or their record in respect of regulation. More likely again to be medium sized or smaller charities, they tend to require closer monitoring and specific individually tailored instructions regarding compliance requirements. Given the lack of past effective regulation in Ireland it will be difficult to anticipate the likely size of this group.

d) **Problematic charities** – these bodies may be fly-by-night bodies of recent vintage or of ephemeral nature. Their actual intentions towards or degree of knowledge of the regulations may also vary, making them inherently difficult to deal with. These bodies will present difficulties not just in relation to fundraising regulation -- though it is in this area that they will be most visible to the public – but are likely to cause issues across the breadth of the charity regulation regime.

Identifying which constituency the non-statutory regime is aimed at is important. It may be that the target audience is predominantly comprised of well-intentioned but ill-informed charities. In such instance the shape of

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regulation proposed and the supports required may be very different from that which may be required if the target audience consists predominantly of either problematic charities or well-intentioned, well-informed charities. In most jurisdictions, the target audience will be a mixture of all of the above but again reflection on the likely breakdown between the four categories even then can assist in prioritising points for action.

Coupled with this broad spectrum of compliance orientated bodies is the fact that the fundraising regulatory regime must work equally across the entire range of non-profit activities under which some organisations may already be subject to various supervisory or reporting mechanisms and thus reluctant to self-impose further regulation in absence of government impetus.

Creating a regime that can speak to all of these needs proves difficult no matter whether one chooses to proceed on a statutory or non-statutory basis. And although it cannot be denied that the possibility of legal enforcement remains the single most significant factor on the effectiveness of a regime, it must be acknowledged that in many cases legal enforcement will be either unattainable or undesirable. Indeed, one might go so far as to state that in the context of the effective oversight of the non-profit sector, state oversight alone has never been (and some would argue will never be) sufficient to accomplish this task.

In keeping faith with the predominantly led non-statutory regulation model, our definition of a "successful" regime must be one that is workable rather than perfect. In the absence of unlimited resources both statutory and non-statutory regimes will have difficulty policing the last category of problematic charities. For a working definition of success, therefore, there are certain truths that may be gleaned from the jurisdictions reviewed here that appear to be universal in application.

- Experience to date suggests that clarity of standards is essential. This requires precise operational norms if compliance is to be monitored and enforcement is to be possible.

- Coverage in terms of fundraising income covered and number of participating charities remain important. However, no scheme in its early years has achieved both and thus the regulator must decide which is primary to its scheme. Coverage of fundraising income may seem the obvious choice since more charitable assets are thus protected. There is much to be said, however, for cross-sector buy-in, particularly from smaller charities. Engaging these latter bodies – those that typically fit in the ‘well intentioned but ill informed’ or ‘ill intentioned and ill informed’

138 See Dale, n. 121 above.
139 See Breen, n. 85 above. See also Dale, n. 121 above.
140 Indeed, statutory regimes often encounter as many problems as self-regulatory schemes, including a lack of resources leading to under-detection of breaches; a certain reluctance on the part of the regulator to prosecute coupled with a reluctance on the part of courts to pose meaningful penalties. See further, Ross Cranston, “Regulation and Deregulation: General Issues” (1982) 5 University of New South Wales Law Review, 1.
categories – may be a greater sign of success than landing the bigger charities who account for larger swathes of charitable funds and would be most likely to follow and lead in good practice in any case.

- Given the need to engage public donors in all non-statutory schemes, a further indicator of success will relate to the public profile of the regulator and public awareness of the kite-mark illustrating adherence to good practice. Thus, a necessary element for an effective scheme will be public profile – specifically how the regulator provides worthwhile opportunities for public engagement and feedback – both of which require a respectable budgetary allowance.

- To be sure, the public and media pay most attention when they witness rigorous enforcement of a scheme. Thus, evidence of interim assessments, published outcomes of complaints and public records of measures taken against charities when codes are breached will do as much for public profile as any advertisement ever could.

- Ongoing revision of codes to take account of changing fundraising practices and once more engagement through public consultation and liaison and cooperation with other regulators, thereby strengthening the place of the codes in the broader regulatory framework would also be a key determinant of success.

- Finally, the ability not only to sustain but also to grow as a financially viable operation must underpin the entire regime. Of the schemes considered in this article, the most financially viable to date is also the one that charges the highest fees for accreditation and membership – surely, no small coincidence. For non-statutory regulation really to work in the context of charitable fundraising regulation, there must be willingness on all sides to participate – from the state (not just in the form of funding but also through enforcement assistance and the ever pending threat to legislate in the case of failure) to the charities themselves (in setting the standards, living the standards and enforcing the standards) right through to the general public (in its appreciation of and insistence upon high standards in fundraising practice).

Both Ireland and Britain have undoubtedly made good starts on the road towards the regulation of charitable fundraising. One would not be surprised to find that Britain is further down the line of implementation than Ireland given its existing advantages in terms of institutional establishment and ready-made codes. Both jurisdictions, however, face challenges in seeing the successful implementation of non-statutory regimes. To work effectively will require ongoing financial resources, effective enforcement and charity sector buy-in. Enthusiasm is high in this latter regard in Ireland amongst well-informed charities that have participated in the consultation process to date. The

challenge for Irish policymakers will be to fully exploit this window of opportunity to harness that enthusiasm in a worthwhile manner that goes beyond a mere Statement of Fundraising Principles. If this is achieved, Ireland and Britain may then face similar issues in the recruitment of those well-intentioned, ill-informed charities and ill-intentioned and ill-informed charities or otherwise how they may effectively be brought under the auspices of these schemes, which ultimately remain only one part of the wider policy solution needed for the effective regulation of charitable solicitation.

Oonagh B. Breen
School of Law, University College Dublin, Ireland.