

EXECUTIVE NOTE
THE CHARITIES AND BENEVOLENT FUNDRAISING (SCOTLAND)
REGULATIONS 2009
(S.S.I. 2009/121)

The above Regulations were made in exercise of the powers conferred by section 83 of the Charities and Trustee Investment (Scotland) Act 2005 (“the Act”). The Regulations are subject to negative resolution procedure.

Policy Objectives

Section 83 of the Act allows Scottish Ministers to make regulations about the solicitation by professional fundraisers of money or promises of money for the benefit of benevolent bodies or for charitable, benevolent or philanthropic purposes, about representations made by commercial participators in relation to benevolent contributions and generally for or in connection with regulating benevolent fundraising by benevolent fundraisers.

A professional fundraiser is a person who solicits for reward money or other property for benevolent bodies, or for charitable, benevolent or philanthropic purposes, or who runs a fundraising business.

A commercial participator is a person who carries on a business other than a fundraising business for gain; and in the course of that business engages in a promotional venture; and represents either that a donation will be made in connection with the sale or supply of goods or services, or that some or all of the amounts paid for such goods or services will be passed to benevolent bodies or given to charitable, benevolent or philanthropic purposes.

Benevolent fundraisers are benevolent bodies and companies connected to benevolent bodies, persons concerned in the management or control of such bodies or companies, employees and agents of such bodies or companies, and volunteers acting on behalf of benevolent bodies or companies connected to them.

The purpose of the Regulations is to regulate the carrying out of fundraising by professional fundraisers, commercial participators and benevolent fundraisers for benevolent bodies or for charitable, benevolent or philanthropic purposes. Benevolent bodies are bodies “established for charitable, benevolent or philanthropic purposes”. This means that many bodies which fundraise and which may have charitable purposes but which, for example, may not provide a sufficient level of public benefit, which are not charities or which have chosen not to be registered as charities will be subject to the Regulations. The intention is that this will maximise public confidence in donating. This approach is consistent with that of existing legislation in Scotland covering street collections and house to house collections, and fundraising legislation in England and Wales in the Charities Act 1992 and the Charities Act 2006 which all regulate benevolent fundraising (and not just fundraising for registered charities). There has been widespread support to introduce regulations in Scotland which mirror the legislative requirements on charities and other benevolent bodies in England and Wales.

These Regulations will provide transparency in that members of the public will be informed what proportion of the donation they make to fundraisers is going to a worthwhile cause and they can therefore make an informed decision as to whether to donate or not.

The Regulations specify the information which must be included in agreements between professional fundraisers or commercial participators and the benevolent bodies they are fundraising for; how and when the funds raised are to be transmitted to the benevolent body and the right of benevolent bodies to see any document or other record held by the professional fundraiser or commercial participator which relates to that benevolent body and which is kept for the purposes of the agreement between the professional fundraiser or commercial participator and the benevolent body.

The Regulations specify the information to be provided by professional fundraisers, commercial participators and by benevolent fundraisers, in written statements when fundraising. They require all fundraisers (excluding those who are volunteers), to state the name of the benevolent body or the benevolent purpose they are fundraising for, and whether they are receiving remuneration. Fundraisers soliciting for more than one body must also state the proportion each body will benefit from the fundraising venture, and when soliciting for a benevolent purpose, how the donations will be distributed and applied. Employees of benevolent bodies are exempt from the requirement to state that whether they are receiving remuneration when they are fundraising in writing.

Professional fundraisers are further required to provide the method by which their remuneration is determined and the notifiable amount of their remuneration in their written statements. Commercial participators are further required to provide the method by which their remuneration is determined and the notifiable amount to be donated to the benevolent body or purpose in their written statements.

Where the solicitation, representation or benevolent fundraising is made orally this information may be provided orally, but professional fundraisers and commercial participators must provide the information on the method of determining their remuneration and the notifiable amount in writing if requested.

These Regulations also give donors a right to a refund if their donation is £100 or more and made by credit or debit card in response to either a radio or television appeal by a professional fundraiser or commercial participator, provided the donor writes to the professional fundraiser or commercial participator requesting a refund within 7 days of the solicitation or representation. Donors are further entitled to a refund of payments of £100 or more when the payment is made in response to a solicitation or representation made orally but not in person, such as over the telephone, again, provided they write to the professional fundraiser or commercial participator requesting a refund within 7 days of the appeal.

The Regulations provide that any fundraiser who, without reasonable excuse, fails to comply with certain requirements of these Regulations may be committing an offence, and if convicted, be liable to a fine.

Consultation

The proposals for the Regulations were the subject of a consultation exercise which took place from 15 December 2005 to 10 March 2006. The consultation involved a range of key stakeholders, including national and local voluntary sector intermediary organisations, representative bodies of particular groups of charities and benevolent bodies, professional bodies, local authorities, and all those organisations which have responded to previous Scottish Executive consultations on charity law reform. Subsequently both the Office of the Scottish Charity Regulator and the Institute of Fundraising have been consulted on the content of the Regulations.

Financial Effects

There are some costs associated with these Regulations. It is not possible to provide accurate estimates of the expected compliance costs. These will vary depending on the size and type of benevolent body, but are expected to be nominal. For example, the provision of an information sheet to a paid fundraiser so they know what statement they need make about remuneration. Since these Regulations are very similar to those which have been in existence in England and Wales for over 10 years, many charities already, in effect, comply with many of the requirements in them as a matter of best practice. The main cost is likely to be incurred by commercial participators and professional fundraisers having to draw up agreements with benevolent bodies to meet the new requirements. However agreements could be drawn up for very little cost using model contracts which are widely available, such as those produced by the Institute of Fundraising. Some benevolent bodies or professional fundraisers/commercial participators may choose to seek legal advice, but that would be a decision for those concerned.

The provisions allowing refunds in certain circumstances should be cost neutral to professional fundraisers and commercial participators since they are able to deduct administrative expenses resulting from paying refunds from the amount refunded. The cost to professional fundraisers and commercial participators of making documents available to benevolent bodies should be limited to the cost of photocopying and postage of them.

These Regulations come into force on 1 July 2009.

A Regulatory Impact Assessment has been prepared and will be available at:
<http://www.scotland.gov.uk/Topics/People/15300/charities/law/implementation-timetable>.

Scottish Government Constitution Law and Courts Directorate

**CHARITIES AND TRUSTEE INVESTMENT
(SCOTLAND) ACT 2005**

**Charities and Benevolent Fundraising (Scotland)
Regulations 2009**

Regulatory Impact Assessment

**Scottish Government
23 March 2009**

**CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) ACT 2005:
CHARITIES AND BENEVOLENT FUNDRAISING (SCOTLAND)
REGULATIONS 2009**

REGULATORY IMPACT ASSESSMENT (RIA)

Introduction

This Regulatory Impact Assessment (RIA) aims to provide information on the options considered in relation to the Charities and Benevolent Fundraising Regulations, made under section 83 of the Charities and Trustee Investment (Scotland) Act 2005 (the Act) and their likely impact on the sector. Under Scottish Cabinet rules, any piece of legislation which will create or extend a regulatory regime must include a consideration of the impact of regulation on the relevant sector.

Purpose and intended effect of regulation

(i) The objective

The Scottish Government is committed to reforming the regulatory regime for charities in order to support the charities sector and to safeguard the public interest in relation to charities. A draft Regulatory Impact formed part of the consultation paper setting out the Government's proposals for the charities and benevolent fundraising regulations under section 83 of the Act. These regulations set out the conditions which must be followed by professional fundraisers, commercial participators and benevolent fundraisers.

This RIA provides background information on the options which were considered when developing the proposals, and the probable impact and cost of these options. We considered the views received on this RIA during the consultation, and have amended it accordingly to be published in final form when the Regulations are laid before the Scottish Parliament.

Devolution: The regulations will only apply to benevolent fundraising in Scotland.

(ii) The background

The Charities and Trustee Investment (Scotland) Act 2005 received Royal Assent on 14 July 2005. Proposals for the Bill were consulted on during the summer of 2004.

Part 2 of the Charities and Trustee Investment (Scotland) Act 2005 sets out an important foundation of statutory regulation of benevolent fundraising, which can be further developed by self-regulation within the charity sector. It also gives Scottish Ministers powers to make regulations on benevolent fundraising.

The fundraising provisions in the Act are drafted to cover fundraising by, and for, 'benevolent bodies' and charitable, benevolent and philanthropic purposes. Benevolent bodies are defined as any bodies established for charitable, benevolent or philanthropic purposes, whether they are registered charities or not. The Act regulates benevolent fundraising in a number of ways. OSCR will have powers to investigate individuals purporting to be a charity or to be collecting on behalf of one when they are not, and to protect any funds raised in this way. The Act requires professional fundraisers and

commercial participators (a normal business which undertakes a promotion from which a good cause will benefit) who solicit money or other goods on behalf of a named benevolent body to have an agreement with that body to do so. The Act also gives benevolent bodies (and hence also charities) the right to seek an interdict preventing unauthorised fundraising in their name. Section 83 of the Act allows Scottish Ministers to regulate benevolent fundraising further through Regulations.

The proposals in the Charities and Benevolent Fundraising (Scotland) Regulations 2009 are made using these powers in section 83 of the Act, and are intended to help maintain public confidence in the sector and increase transparency without placing undue burdens on charities and other benevolent bodies.

The majority of the provisions in the Regulations apply only to fundraising by professional fundraisers and commercial participators. Professional fundraisers are defined in section 79 of the 2005 Act as “a person (other than a benevolent body or company connected with it) who carries on a fundraising business, and any other person who for reward solicits money or other property for the benefit of a benevolent body or for charitable, benevolent or philanthropic purposes”. Commercial participators are defined as a person who “carries on for profit a business other than a fundraising business, but in the course of that business, engages in a promotional venture in the course of which it is represented that benevolent contributions are to be (i) given to or applied for the benefit of one or more particular benevolent bodies, or (ii) applied for charitable, benevolent or philanthropic purposes”. The Regulations set out the information which must be included in agreements between professional fundraisers/commercial participators and benevolent bodies they are fundraising for, how the funds raised are to be transmitted to the benevolent body and the right of benevolent bodies to see documents relating to an agreement with a professional fundraiser/commercial participator.

The Regulations also set out a requirement for **all** benevolent fundraisers who are being paid to fundraise to make a statement to potential donors advising that they are receiving remuneration. A benevolent fundraiser is a company connected to a benevolent body, and their employees and agents, and volunteers collecting for a benevolent body, or for charitable, benevolent or philanthropic purposes. This requirement applies not only to professional fundraisers and commercial participators, but also to in-house staff of the benevolent body.

The establishment of a self-regulation scheme for fundraising was considered the best way to promote best practice in fundraising, and as a result the fundraising sector has developed a self regulation scheme which was launched in February 2007 and which will run alongside these Charities and Benevolent Fundraising Regulations. The Fundraising Standards Board (Scotland) is a self-regulatory scheme whose membership is open, on a voluntary basis, to all organisations engaged in public fundraising.

The Act also sets out a system for licensing public benevolent collections. Separate proposals for the detailed operation of the public benevolent collection process will be issued for consultation in 2009.

(iii) Rationale for government intervention

Benevolent fundraising is an evolving area and there was widespread support in the consultation on the draft Bill in 2004 to regulate fundraising for benevolent bodies through

the Bill and subsequent Regulations. In particular, provisions allowing benevolent bodies greater control over those fundraising for them, and the requirement for professional fundraisers and commercial participators to have an agreement with a benevolent body before fundraising on their behalf were welcomed.

21st century charity fundraising is big business. Estimates from the Scottish Council for Voluntary Organisations show that Scottish charities raise over £2 Billion a year to spend in our communities. Charities raise funds from a vast range of sources: from government grants and contracts; from Local Authorities; from the National Lottery; from other charities; from trading and investments; from corporate sponsorship; and of course from public donations (which provide around £240 million a year to charities in Scotland).

There is evidence that a small number of scandals reported in the media affected public confidence in giving to charities. The Regulations aim to ensure transparency and accountability, therefore helping public confidence and supporting benevolent fundraising.

(iv) Risk assessment

The new Regulations are an essential part of the implementation of the Charities and Trustee Investment (Scotland) Act 2005. Without the new Regulations, the only legislation regulating benevolent fundraising in Scotland will be section 119 of the Civic Government (Scotland) Act 1982 and the Regulations made under it to regulate the licensing of Public Charitable Collections (or any regulations which may be made under the 2005 Act to replace these with a system of licensing Public Benevolent Collections), and the requirement under the 2005 Act for professional fundraisers/commercial participators to have an agreement with a benevolent body before fundraising on their behalf, and the right of benevolent bodies to seek an interdict preventing unauthorised fundraising in their name.

A lack of regulation of benevolent fundraising would severely hamper the attempts to provide a transparent and straightforward regulatory framework for charities in Scotland and undermine the principles of the Charities and Trustee Investment (Scotland) Act 2005, and would not encourage public confidence in benevolent fundraising.

Consultation

Within government

The following government agencies and departments have been consulted in preparation of this RIA:

Office of the Scottish Charity Regulator (OSCR).

Public consultation

A public consultation has been carried out on the Regulations on Charities and Benevolent Fundraising from December 2005 to March 2006.

Options

Option 1: Do nothing

This option would involve not using the powers in section 83 of the Charities and Trustee Investment (Scotland) Act 2005 to regulate benevolent fundraising. This would mean that the only legislation regulating benevolent fundraising (other than the existing public charitable collection licensing system and its replacement for licensing public benevolent collections), would be the requirement under the 2005 Act for professional fundraisers/commercial participators to have an agreement with a benevolent body before fundraising on their behalf, and the right of benevolent bodies to seek an interdict preventing unauthorised fundraising in their name.

Option 2: Implement Charities and Benevolent Fundraising Regulations

Implementation of the Regulations will introduce statutory control of fundraising which will run alongside the scheme of self regulation of fundraising currently in operation within the sector. These Regulations set out the information which must be included in agreements between professional fundraisers/commercial participators and benevolent bodies they are fundraising for, how the funds raised are to be transmitted to the benevolent body and the right of benevolent bodies to see documents relating to an agreement with a professional fundraiser/commercial participator. The Regulations also set out a requirement for **all** benevolent fundraisers in receipt of remuneration to make a statement to potential donors setting out whether they are being paid to collect. This requirement applies not only to professional fundraisers and commercial participators, but also to in-house staff of a benevolent body.

Since these Regulations do not use all the powers available to Scottish Ministers in section 83 of the 2005 Act, Ministers would be able to introduce further statutory regulation of benevolent fundraising if self regulation was not felt to be sufficiently effective.

Option 3: Introduce more extensive regulations using all the powers available to Scottish Ministers to regulate charities and benevolent fundraising

An alternative to introducing a mixture of statutory and self regulation would be for Regulations to introduce a statutory regulation scheme, using all the powers available to Ministers in section 83 of the 2005 Act. As well as the provisions outlined in option 2, this would probably involve preparing a statutory code of practice to be followed by all fundraisers, with a kitemark or other mark of compliance, regulated by either OSCR or another new regulator.

Costs and benefits

Business sectors affected

All existing charities fundraising in Scotland will be affected by the Regulations. Non-charity benevolent bodies that fundraise in Scotland will also be affected since the Regulations cover all benevolent fundraising. Fundraising businesses will be affected by the

Regulations when carrying out fundraising for benevolent bodies. Other businesses whose main business is not to fundraise, but in the course of their normal business fundraise for benevolent bodies (ie act as commercial participators) will also be affected since these activities will also be covered.

Benefits

Option 1: Do Nothing

There would be little benefit from this option. Although the sector would have fewer legislative requirements to comply with, there was widespread support from the sector during the consultation on the Draft Charities and Trustee Investment (Scotland) Bill in 2004, and during the parliamentary passage of the Bill, for the introduction of greater regulation of benevolent fundraising.

Option 2: Implement Charities and Benevolent Fundraising Regulations

There has been widespread support for this approach. The Regulations would ensure accountability and transparency to help assist public confidence in the sector, while self regulation would cover the behaviour of the fundraisers. The Regulations are flexible enough to meet the needs of different bodies and fundraisers, who may for example wish to use different types of contract. There are benefits in allowing the sector to regulate certain aspects through self regulation – a self regulation scheme will be able to adapt more quickly to meet changing needs than the Regulations will be able to, and the sector launched the scheme in early 2007, before Regulations under the 2005 Act were in force. In addition, making use of the industry's plans for self-regulation is more cost effective and ensures that the sector is closely involved in establishing the regulatory regime it will have to follow.

There is evidence that a small number of scandals reported in the media affected public confidence in giving to charities. The Regulations aim to ensure transparency and accountability, therefore helping public confidence and supporting benevolent fundraising.

Option 3: Introduce more extensive Regulations using all the powers available to Scottish Ministers to regulate charities and benevolent fundraising

Introducing more extensive Regulations using all the powers available to Scottish Ministers in section 83 of the 2005 Act to regulate benevolent fundraising would allow Ministers greater control over benevolent fundraising. In addition, there would be no need for benevolent bodies and fundraisers to join a sector scheme of self regulation.

Costs

Option 1: Do nothing

There would be no direct costs to benevolent fundraisers in this option. This would leave no detailed requirements for benevolent fundraising in Scotland and would seriously undermine the principle of transparency which underpins the Charities and Trustee Investment (Scotland) Act 2005. There would be no greater transparency to the public because they would not be given any information about the remuneration of fundraisers and professional

fundraisers/commercial participators would be no more accountable to the benevolent bodies they were fundraising on behalf of. Charity fundraising has borne the brunt of recent media attentions and public lack of confidence, and there is evidence that a small number of scandals reported in the media affected public confidence in giving to charities. Therefore, it is probably not tenable to consider the status quo of not establishing any controls on fundraising, since it may have indirect costs by leading to future decreases in public donations to benevolent bodies.

Option 2: Implement Charities and Benevolent Fundraising Regulations

Those undertaking benevolent fundraising will need to ensure that they are aware of, and comply with, the requirements the Regulations place on them. Many benevolent fundraisers and professional fundraisers/commercial participators will face no additional costs because they already meet sector good practice requirements which cover these provisions. It has not been possible to provide accurate estimates of compliance costs, although we do not believe they will be significant, even to those who do not currently meet the requirements through following best practice. There will be no cost to benevolent fundraisers in making the statement about their remuneration. Professional fundraisers/commercial participators will need to make additional information available to potential donors if requested – the cost of producing an A4 laminate for each fundraiser to show to donors is at a quoted cost of 8 pence/sheet, and the cost of producing paper copies which could be handed out to donors who wished to take the information away would be 15 pence/sheet based on a sample quoted cost of some £150 per 1,000 sheets.

Contracts could be drawn up for very little cost using model contracts which are widely available, such as those produced by the Institute of Fundraising. Some benevolent bodies or professional fundraisers/commercial participators may choose to seek legal advice, but that would be a decision for those concerned.

The provisions allowing refunds in certain circumstances should be cost neutral to professional fundraisers and commercial participators since they are able to deduct expenses from the amount refunded. This would lead to a small cost to the donor who asked for the refund; but without these provisions they would not necessarily be entitled to a refund at all. There would also be a cost to the benevolent body in terms of the lost donation.

The cost to professional fundraisers and commercial participators of making documents available to benevolent bodies should be limited to the cost of photocopying and postage of them, with a quoted cost of 15 pence/sheet, although some benevolent bodies may not require copies to be made. The transmission of money provisions should not lead to any additional cost.

Those joining the self regulation scheme would be required to pay a small, proportionate membership fee, to be set by the body in charge of the scheme.

Option 3: Introduce more extensive Regulations using all the powers available to Scottish Ministers to regulate charities and benevolent fundraising

Ministers would have to develop statutory codes of conduct, which would take time and cost money and could not be implemented as quickly as self regulation, which is already being utilised. Ministers have already publicly agreed to allow the scheme time to prove its worth. Making use of the industry's plans for self-regulation is more cost effective and ensures that

the sector is closely involved in establishing the regulatory regime it will have to follow. It has not been possible to provide accurate estimates of compliance costs, although they are likely to be higher than those under option 2. Those who would have joined the self regulation scheme under option 2 will not have to pay a membership fee. However, all the other points raised under the cost of option 2 would apply to option 3. In addition, all benevolent fundraisers would have to comply with the statutory code of practice.

It is likely that many benevolent bodies and fundraising businesses would incur additional costs in training fundraisers to ensure that they were aware of, and able to comply with, the legislation. In addition, it is likely the regulations would require benevolent bodies and fundraisers to display and make use of a kitemark or other mark of compliance on their fundraising material, and possibly other material also. Clearly, there would be a cost to bodies in incorporating this kitemark into the necessary documents, and in reprinting costs. Based on a sample quoted cost of some £150 per 1,000 sheets for printed letterheads etc, the cost of reprinting would be £0.15 x average no. of sheets used per year. This cost is not expected to be significant in comparison to normal administration costs. In many cases, benevolent bodies and fundraisers are likely to use PC generated documents, for which additional identification can be easily added at little or no extra cost.

Consultation with small business

The Regulations will apply to any professional fundraising business, or any business which acts as a commercial participator, and some of these (especially the professional fundraising businesses) may be small firms or micro-businesses. We consulted the Federation of Small Businesses, as well as the Institute of Fundraising and PFRA (Public Fundraising Regulatory Association), both of whom represent professional fundraising businesses amongst others, about the Regulations. The Institute of Fundraising feels that the Regulations strike the right balance and will not cause small businesses undue problems. The Federation of Small Businesses does not feel that the Regulations will have a significant impact on small businesses, but stressed the need to ensure that the Regulations and penalties are applied proportionately so that the relationship between small local benevolent bodies and small businesses is not jeopardised. They also queried how small businesses will know about any requirements on them. The PFRA did not raise any concerns about the cost impact of the proposals on their members since they already comply with the requirements in the Regulations.

In addition, the consultation in 2004 on the draft Charities and Trustee Investment (Scotland) Bill included our proposals for the contract between professional fundraisers/commercial participators and benevolent bodies and a statement by them of their remuneration. This consultation paper was sent to a wide variety of bodies and individuals, as well as being available on the Scottish Executive website. No concerns were raised about the impact on small businesses.

We do not envisage that any of these Regulations will have a significant impact on small business. They do not prevent small businesses from undertaking benevolent fundraising; they merely set out certain procedures that must be followed. Since these procedures mirror current best practice the Regulations are likely to have no impact on many small businesses who undertake benevolent fundraising, and we do not expect those who have to change their procedures slightly to meet the new requirements (such as the form of contract, or ensuring

that the remuneration/amount going to the good cause is indicated) to encounter much cost or time in meeting these new Regulations.

Test run of business forms

The Regulations introduce a requirement for professional fundraisers or commercial participators to have a contract with any benevolent body for whom they are fundraising. However, they do not introduce a statutory business form which must be completed, but merely set out certain things which must be included in the contract. Therefore there is no business form which needs to be tested.

Competition Assessment

The Charities and Benevolent Fundraising (Scotland) Regulations 2009 set out in the consultation paper are not expected to have any impact on competition. They will make benevolent fundraising activities more transparent, and clarify the legal requirements of charities. However they will not distort or restrict competition within markets in which fundraising/fundraisers or benevolent bodies operate.

Enforcement, sanctions and monitoring

The provisions will be enforced by the Office of the Scottish Charity Regulator (OSCR), Local Authorities, the police or other relevant regulators.

Implementation and delivery plan

The Regulations will be laid before the Scottish Parliament on 25 March 2009 and will come into force on 1 July 2009. The Office of the Scottish Charity Regulator will issue guidance on the Regulations.

Post-implementation review

OSCR will be tasked with reviewing implementation of the legislation and Regulations, and advising the Scottish Government of any need for change. The Scottish Government will review the impact of the Regulations within ten years of them coming into force.

Summary and recommendations

Based on the analysis outlined above and the analysis of the responses to the consultation, the Scottish Government recommends the adoption of option 2. The Regulations have been drafted on this basis.

Declaration and Publication

I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.

Signed by the Responsible Minister

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Fergus Ewing

Date

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