

BRIEFING NOTE:

27 September 2016

Charity fundraising update

This note covers recent developments regarding the regulation of charity fundraising, namely:-

- the launch of the new Fundraising Regulator;
- the publication of the Charity Commission's revised fundraising guidance (and its increased expectations of charity trustees); and
- additional requirements in relation to fundraising introduced pursuant to the Charities (Protection and Social Investment) Act 2016.

1. The new Fundraising Regulator

The new charity fundraising regulatory body, the Fundraising Regulator, was formally launched over the summer of 2016. The Fundraising Regulator has replaced the regulatory functions of:-

- the Fundraising Standards Board ("FRSB") (the body responsible for receiving complaints about charity fundraising and adjudicating on whether or not any of its members have, or have not, broken the Code of Fundraising Practice ("the Code"); and
- the Public Fundraising Regulatory Association ("the PFRA"), the body responsible for the regulation of street and doorstep fundraising.

The Fundraising Regulator has also assumed responsibility for (a) the Code from the Institute of Fundraising ("IoF") and (b) the rules on street and door to door fundraising from the PFRA. The Code and rules will be reviewed and any decisions on changes will be made by the Fundraising Regulator's Standards Committee in consultation with fundraising stakeholders.

The FRSB will close in due course. The PFRA merged with the IoF at the end of August this year. The merged body has no regulatory functions. It is a (voluntary) membership organisation that will focus on best practice and assisting its members with their fundraising obligations.

Registration with the Fundraising Regulator

Charity fundraising will, for the time being at least, continue to be self-regulating. Registration with the Fundraising Regulator will be voluntary. However, all charities involved in fundraising (and other fundraising organisations such as professional fundraisers) will be encouraged to register with the Fundraising Regulator by way of demonstrating their commitment to good fundraising practice and support for the Code.

The registration process is still being finalised but it is anticipated that charities and other fundraisers will be invited to register at some stage this Autumn. Those who do register will be

entitled to use the Fundraising Regulator “badge” on their website, stationery and fundraising materials. In addition, registrants’ names will be published on the Fundraising Regulator’s website as a public demonstration of commitment to good practice.

Levy and registration fees

The Fundraising Regulator is independent from government and does not therefore receive government funding. 45 charities have contributed to its set up costs and it will be funded on an ongoing basis by a levy to be charged to charities which spend £100,000 or more each year on fundraising. The levy will be set according to where a charity’s annual fundraising income sits within one of 10 bands. Charities that spend more than £50 million each year will be charged the highest annual levy of of £15,000 and charities which spend between £100,000 and £149,999 will be charged the lowest annual levy of £150.

The levy will apply from 1 September this year and will be assessed on the fundraising expenditure shown in the Charity Commission annual returns for 2014. The Fundraising Regulator has confirmed that it will now start writing to all those charities that will be subject to the levy before sending out invoices.

Exempt charities will be charged a fixed rate annual levy of £1,000. It is not clear, however, at this stage whether all exempt charities must pay the fixed rate levy or only those who spend funds on raising voluntary income. The Charity Law Association has sought clarification on this point but to date, the Fundraising Regulator’s focus seems to have been on Higher Education institutions, rather than exempt charities generally, and the position currently remains unclear. (The Fundraising Regulator has confirmed that all Higher Education institutions (including the 18 universities which are registered charities) will be charged the fixed rate levy).

Those charities that are not subject to the levy but which choose to register with the Fundraising Regulator will be charged an annual registration fee of £50.

Professional fundraisers and other such third party commercial suppliers who opt to register with the Fundraising Regulator will be charged an annual fee assessed on their annual income and based on the bands currently used by the FRSB.

Transitional arrangements between the FRSB and the Fundraising Regulator

The Fundraising Regulator is working with the FRSB with a view to ensuring that the transition from the existing system is as smooth as possible. The FRSB has confirmed that it intends to refund any unused balance of members’ fees once it has closed.

Once the registration process with the Fundraising Regulator is finalised there will be an interim period during which the FRSB “tick” logo may remain on current marketing and other materials, to give charities and other fundraisers time to reflect the new Fundraising Regulator badge on their materials.

Fundraising Preference Service

The Fundraising Regulator is devising a Fundraising Preference Service (“FPS”) which will enable individuals, especially the vulnerable, to receive only the fundraising materials they want and need. A consultation paper was launched on 24 August and is due to close on 30 September this year. The

consultation is seeking views, amongst other things, on how the FPS is expected to work alongside the existing Telephone Preference Service and the Mail Preference Service.

It is proposed that the FPS will apply to charities spending £100,000 a year or more on fundraising. The FPS is being developed for launch in 2017.

Relationship with the Charity Commission

The Fundraising Regulator and the Charity Commission have signed a Memorandum of Understanding. This sets out the respective functions of each regulator with regard to charity fundraising and the referral process between them.

In essence, the Fundraising Regulator will initially assess all complaints about fundraising. If a complaint raises any of the following issues, the complaint will be immediately referred to the Charity Commission:-

- serious concerns about trustee conduct;
- serious concerns about financial management;
- serious breaches of trust;
- serious concerns that a charity is not being used for exclusively charitable purposes; and
- repeated failure by a charity to take adequate action to address rulings of the Fundraising Regulator.

In turn, the Charity Commission will inform the Fundraising Regulator of any statutory inquiry or operational compliance case opened on fundraising practices, including details of any individuals who are part of the investigation, unless to do so would prejudice the inquiry or compliance case or compromise other agency action.

2.Revised Charity Commission guidance CC20: *Charity fundraising: a guide to trustees' duties*

The revised CC20 was published in June this year. In the revised guidance, the Charity Commission emphasises that effective control by trustees over their charity's fundraising is a vital part of compliance with their legal duties. The Commission asserts that three of the key legal duties of charity trustees, which are set out in its core guidance CC3: *The essential trustee: what you need to know, what you need to do*, are particularly relevant in the context of fundraising. These are:-

- acting in the best interests of your charity;
- managing your charity's resources responsibly, which includes protecting and safeguarding its reputation; and
- acting with reasonable care and skill.

The six fundraising principles

The Commission then sets out six principles which it recommends trustees should follow to help them meet their responsibilities regarding their charity's fundraising activities. These are:-

1. Plan effectively

Trustees should agree or set and then monitor their charity's overall approach to fundraising. The fundraising plan should also take account of risks, the charity's values and its relationship with donors and the wider public, as well as income needs and expectations.

2. Supervise your fundraisers

Trustees should ensure that there are systems in place to oversee fundraising which others carry out on behalf of their charity (eg in-house fundraisers, volunteers, professional fundraisers, commercial participators¹, trading subsidiaries and appeals and other fundraising initiatives undertaken by the public), so that they can be satisfied that such activities are, and remain, in their charity's best interests.

Note that there are specific legal requirements regarding a charity's arrangements with professional fundraisers and commercial participators and these requirements have been enhanced pursuant to the Charities (Protection and Social Investment) Act 2016, in respect of which please see section 3 below.

Please also note that in the light of recent high profile matters involving charities and their commercial partners (for example, Age UK and E.ON), the Charity Commission issued an alert earlier this year urging trustees to review any arrangements that their charities (or trading subsidiaries) have with commercial organisations to ensure that they are in the best interests of their charity.

3. Protect your charity's reputation, money and other assets

Trustees should ensure that there is strong management of their charity's assets so that they can meet their legal duty to act in their charity's best interests and protect it from undue risk. This includes trustees ensuring that there is adequate consideration of the impact of their charity's fundraising on its donors, supporters and the public, making sure that their charity receives all the money to which it is entitled and taking steps to reduce risk of loss or fraud.

4. Identify and ensure compliance with the laws or regulations that apply specifically to your charity's fundraising

In addition to the specific laws which relate to professional fundraisers and commercial participators and the new enhanced fundraising reporting requirements for larger charities (see section 3 below), a charity might be subject to other laws that apply to its fundraising activities. These include, but are not limited to, laws relating to charity trading and tax, VAT,

¹ A commercial participator is a commercial enterprise, rather than a fundraising business, that takes part in a promotional venture, such as an advertising or sales campaign, where the public are informed that contributions will be given to or applied for the benefit of a charity.

donor benefits in relation to gift aid, data protection, lotteries and raffles, street and door to door collections and licensing in relation to the sale of alcohol.

5. Identify and follow any recognised standards that apply to your charity's fundraising

The Commission confirms that it expects all charities that fundraise to comply fully with the relevant aspects of the Code (see section 1 above) – this expectation applies irrespective of whether or not a charity is registered with the Fundraising Regulator.

6. Be open and accountable

This includes complying with any relevant statutory accounting and reporting requirements on fundraising (see section 3 below) and using reporting to demonstrate that a charity is well run and effective. Trustees should also ensure that their fundraising materials effectively and clearly explain their charity's work to members of the public, donors and supporters. In particular fundraising appeals should be carefully and clearly worded. Procedures should also be in place for dealing with complaints about fundraising.

Checklist

In addition to the CC20 guidance, the Charity Commission has produced an accompanying checklist which consists of a series of questions to help trustees evaluate the performance of their charity against the advice in the guidance. (See section 4 below for a link to the checklist).

3.Charities (Protection and Social Investment) Act 2016

The fundraising provisions of the above Act will come into force on 1 November this year.

Agreements with professional fundraisers and commercial participators

The following additional provisions need to be included in the prescribed agreements² between charities and professional fundraisers or commercial participators:-

- details of any voluntary fundraising scheme or standard with which the professional fundraiser or commercial participator undertakes to comply for the purposes of the agreement (ie commitment to comply with the relevant aspects of the Code and whether or not the professional fundraiser or commercial participator is registered with the Fundraising Regulator);
- how the professional fundraiser or commercial participator is to protect vulnerable people and other members of the public from (a) unreasonable intrusions of privacy, (b) unreasonably persistent approaches for donations and (c) undue pressure to donate; and
- how the charity will monitor compliance with these new duties.

² Pursuant to the Charities Act 1992 and the Charitable Institutions (Fund-Raising) Regulations 1994 agreements between charities and professional fundraisers or commercial participators must include certain provisions.

Annual report

Charities that are required to have their accounts audited (currently those charities with a gross annual income of £1 million or more) will also need to report on the following specific fundraising matters in their annual report and accounts:-

- the charity's approach to fundraising and, in particular, whether a professional fundraiser or commercial participator was used;
- details of any voluntary fundraising schemes with which the charity or anyone acting on its behalf has agreed to comply (ie the Code and whether or not the charity or third party is registered with the Fundraising Regulator);
- details of any failure to comply with the Code;
- whether and how the charity has monitored fundraising activities carried out on its behalf;
- the number of any complaints received by the charity in respect of its fundraising activities or by any person or organisation acting on its behalf; and
- what the charity has done to protect vulnerable people and other members of the public from unreasonable intrusion into a person's privacy and unreasonably persistent approaches and/or undue pressure to give money or property to the charity.

4. Next steps?

Charity trustees should now:-

1. Read the following Charity Commission guidance and any other guidance which may be relevant to their charity:-

CC3 *The essential trustee: what you need to know, what you need to do*

<https://www.gov.uk/government/publications/the-essential-trustee-what-you-need-to-know-cc3>

CC20 *Charities and fundraising: a guide to trustees' duties*

<https://www.gov.uk/government/publications/charities-and-fundraising-cc20>

Remember that in its core guidance CC3, the Commission states that it expects trustees to be able to demonstrate that their charity is legally compliant, well run and effective in carrying out its purposes. It expects trustees to justify their approach, particularly if they decide not to follow the Commission's good practice recommendations. Furthermore, the Commission warns that when looking into a case of potential breach of trust or duty or other misconduct or mismanagement, it may take into account evidence that the trustees have exposed their charity, its assets or its beneficiaries to harm or undue risk by not following good practice. Therefore, any proposed departure from any relevant recommended good practice (including the specific recommendations in the Commission's fundraising guidance) should be carefully considered and the reasons for doing so accurately minuted.

2. Complete the Charity Commission fundraising checklist and take such actions as considered necessary/appropriate:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/549289/CC20_Ch_ecklist.pdf

3. Register to receive communication updates from the Fundraising Regulator:

<https://www.fundraisingregulator.org.uk/>

4. Register with the Fundraising Regulator (from Autumn 2016) as considered appropriate. It is anticipated that in practice, charities that undertake a significant amount of fundraising will be expected to register. Remember that if a charity (or other fundraiser) decides not to register with the Fundraising Regulator, it/he/she will still be expected to comply with the Code so far as it is relevant.

5. Familiarise themselves with the relevant aspects of the Code and keep abreast of any changes to the Code.

6. Keep abreast of developments regarding the launch of the FPS, so far as it may be relevant to their charity.

7. Ensure that, from 1 November this year, their charity is complying with the new requirements introduced by the Charities (Protection and Social Investment) Act 2016 in relation to fundraising agreements and annual reporting.

8. Review other fundraising arrangements and agreements with third parties to ensure that these are in the best interests of their charity. Take such steps as considered appropriate (after having taken any necessary expert advice) to alter or terminate the arrangement or agreement.

This note is a brief summary only of where we are in the changing charity fundraising landscape and we will be publishing further updates in due course, in particular in relation to the registration process with the Fundraising Regulator and any updates/amendments to the Code.

Sarah Chiappini
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This note provides a general summary only and it does not constitute legal advice. It is recommended that specific advice is sought in relation to the particular facts of a given situation.