

BRIEFING NOTE:

31 January 2017

Charity fundraising update (II)

This note follows up on some of the issues covered in our first fundraising update (September 2016 - see the link below). It also covers recent developments/news items regarding charities and fundraising – including some recommended actions following two joint alerts issued by the Charity Commission (“CC”) and the Fundraising Regulator (“FR”) regarding (a) arrangements with fundraisers and (b) data protection.

http://filanthropia.co.uk/Briefing_note_fundraising_update_27_Sept_2016.pdf.

1 The Fundraising Regulator

Consultation on proposed amendments to the Code of Fundraising Practice (the “Code”)

The FR has confirmed that its proposed amendments to the Code (which sets out the relevant law and best practice procedures regarding the various aspects of charity fundraising) will go out for consultation in the Spring this year. Those wishing to participate in the consultation process should email the FR at:

consultations@fundraisingregulator.org.uk.

All fundraising levy invoices have now been dispatched

Levy invoices for 2016/2017 have now been sent to all those charities whose annual fundraising expenditure is £100,000 or more. It is understood that, on the whole, the charities have been co-operative in paying this voluntary levy. However, some charities have raised queries in respect of the fundraising expenditure bracket on which their levy has been calculated – so do check that your charity’s levy has been accurately assessed.

All charities (and other fundraisers) should be able to register with the FR by the end of March 2017

All those charities that have paid the levy will automatically be registered with the FR.

Invitations to register with the FR are currently being sent to all those charities and other organisations and individuals involved in charity fundraising who were registered with the Fundraising Standards Board (“FRSB”) immediately before its closure in September 2016.

It is anticipated that those charities and other fundraisers which wish to register with the FR, but which were not previously registered with the FRSB, will be able to register by the end of March this year.

Confirmation of transitional arrangements between the FRSB and the FR

The FR has confirmed that it expects all organisations and individuals to ensure that materials using the FRSB logo are no longer in use by 1 April 2017. Charities and other fundraisers currently producing and publishing new fundraising materials must not, however, use the FR's "registration badge" until they have registered with the FR.

Confirmation of launch of the Fundraising Preference Service ("FPS")

Although the need to create a separate FPS (in addition to the existing Telephone Preference Service and Mail Preference Service) has been questioned, following its consultation on this issue, the FR has confirmed that the introduction of the FPS will indeed go ahead – sometime this year. We will publish more details on this as they become available.

First FR adjudication decision - Neet Feet

In the light of allegations published in The Sun last July, in November the FR published its first adjudication decision following an investigation into Neet Feet (a third party fundraising agency or "professional fundraiser"¹) and eight charities that contracted with it to fundraise on their behalf.

The FR concluded that all but one of the eight charities concerned failed to make all reasonable efforts to assure themselves (and in doing so the public) that Neet Feet was complying with the requirements of the Code. The FR noted that the monitoring of Neet Feet's work, on the whole, largely focussed on financial performance rather than donor experience. In some cases the donor experience involved intimidating and disrespectful behaviour towards the public and and pressuring the public into donating.

There were also some concerns that there were insufficient policies and procedures in place regarding the employment by Neet Feet of persons with a criminal record.

The Chief Executives of all of the charities involved have been asked by the FR to confirm within three months what action they have taken in response to its findings. At this stage, the FR has not referred any of the charities to the CC. However, pursuant to the terms of the Memorandum of Understanding between the FR and the CC, it is possible that if the FR is not satisfied with the remedial actions that the charities have taken then some or all of them will be referred to the CC.

The FR has also proposed various changes to the Code and the inclusion of additional supporting guidance to address the issues raised in this matter.

A full copy of the decision can be downloaded from:

<https://www.fundraisingregulator.org.uk/adjudications/neet-feet-ltd-eight-charities/>

¹ See footnote 2 for a definition of "professional fundraiser".

2 Time to review agreements with Professional Fundraisers and Commercial Participators

Additional requirements pursuant to the Charities (Protection and Social Investment) Act 2016 (the “2016 Act”)

Why and what?

The new requirements are a consequence of the media interest in the death of the poppy seller, Olive Cooke. They are aimed at protecting the public (particularly the vulnerable) from intimidating and intrusive fundraising practices (as also highlighted in the above mentioned Neet Feet case).

The prescribed agreements (“Fundraising Agreements”)² between charities and professional fundraisers³ and commercial participators⁴ (“Third Party Fundraisers”) will, amongst other things, now also need to include:

- details of any voluntary fundraising scheme or standard with which the Third Party Fundraiser undertakes to comply for the purposes of the agreement (ie commitment to comply with the relevant aspects of the Code and whether or not he/she/it is registered with the FR);
- details of how the Third Party Fundraiser 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: the terms underlined are not defined in the 2016 Act but the FR has published examples of practices which may be considered to fall within their scope. See the link below:
<https://www.fundraisingregulator.org.uk/information-registration-for-fundraisers/charities-act-faqs/>; and
- how the charity will monitor compliance with these new duties.

*The FR has confirmed that **all** Fundraising Agreements are to be compliant*

The relevant provisions of the 2016 Act came into force on 1 November 2016. There has been some confusion as to whether or not the new provisions would apply to Fundraising Agreements in existence before that date. However, the FR has now confirmed that it expects **all** Fundraising Agreements to be compliant, irrespective of when signed.

These new legal requirements have now been included within the Code and the FR has warned charities that if they are not met, this will be taken into account in respect of any matter upon which it adjudicates.

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

³ A “professional fundraiser” is, in essence and subject to exceptions, (a) any person who carries on a fundraising business which is primarily engaged in soliciting or procuring money for a charitable institution (ie charities and other organisations established for benevolent or philanthropic purposes) or (b) any person who for reward solicits money or other property for the benefit of a charitable institution.

⁴ A “commercial participator” is, in essence, any person who encourages purchases of goods or services on the grounds that some of the proceeds will go, or a donation will be made to, a charitable institution.

Timescale

Although the new law has been in force since November 2016, the FR says that until 31 March 2017 it will take a flexible approach in order to allow for reasonable contingency arrangements to be put in place.

Action required?

If you have not done so already, you should:-

- review any existing Fundraising Agreements;
- enter into discussions with your Third Party Fundraiser(s) in order to identify how you/the Third Party Fundraiser(s) will comply with the new legal obligations; and
- amend your Fundraising Agreements accordingly – in respect of which it may be necessary to obtain expert advice.

CC and FR issue joint alert about working with Third Party Fundraisers

Also in November last year, and presumably with not only the Neet Feet matter in mind but other recent high profile cases involving charities and fundraising, the CC and the FR issued a joint alert to charities working with Third Party Fundraisers. The alert can be downloaded from the link below:

<https://www.gov.uk/government/news/regulators-issue-joint-alert-about-working-with-third-party-fundraisers>

The alert reminds charity trustees that they have an overarching duty to ensure that any arrangement with a Third Party Fundraiser is set up and controlled in a way so that it is in the best interests of their charity and protects its assets and reputation. This should not be news to charity trustees.

CC shifts focus to charity trustees

However, more interestingly the CC states in the alert that although Third Party Fundraisers are responsible for complying with their legal obligations regarding their arrangements with charities⁵, in its view, charities themselves must ensure that such arrangements are legally compliant. The CC goes on to confirm that failure to ensure compliance will generally amount to misconduct and mismanagement of the charity's affairs. This would then allow the CC to instigate its extensive regulatory and protective powers and the trustees could be potentially jointly and severally personally liable in respect of any resultant loss to their charity.

This is a clear shift in the CC's approach, as until now the CC has seemingly had little appetite to regulate charities' arrangements with their Third Party Fundraisers. In short, the CC now expects

⁵ Pursuant to the Charities Act 1992: (a) if there is no Fundraising Agreement in place or if it does not contain all of the prescribed legal requirements, the Third Party Fundraiser can only enforce its arrangements (ie for payment) if it obtains an order of the court; (b) there are a number of criminal offences in relation to Third Party Fundraisers (although it appears that there have been no such prosecutions to date); and (c) charities have the right to apply to court for an injunction to prevent any Third Party Fundraiser soliciting money from the public without having entered into a prescribed agreement.

charity trustees to be far more proactive in ensuring that their charity's arrangements with Third Party Fundraisers are legally compliant.

Warning to charities

The CC and the FR also warn charities against entering into fundraising arrangements that include certain characteristics (which are set out in the alert), including arrangements which bear all the hallmarks of a Third Party Fundraiser arrangement but which have been structured to avoid the legal rules – eg calling a professional fundraiser an advisor or consultant, even though in reality he/she/it is controlling the solicitation of funds on the charity's behalf.

General application of legal principles

Where a charity enters into an arrangement which is neither a professional fundraising nor a commercial participation arrangement, it is not technically subject the provisions of the 1992 Act, the Fundraising Regulations or the 2016 Act. However, the CC confirms in the alert that as a matter of good practice it expects charities to apply the same legal principles as they would if they were entering into an arrangement with a Third Party Fundraiser.

In short, therefore, the CC expects all such arrangements to be set out in an agreement based on the prescribed agreement and which includes the additional provisions introduced by the 2016 Act. Again, the CC confirms that it will regard failure to adopt this approach as mismanagement of the charity's affairs.

Action required?

- in addition to reviewing any Fundraising Agreements with a view to ensuring that the new 2016 Act provisions are included, you should review your Fundraising Agreements generally to ensure that they are in the prescribed form;
- check whether any fundraising arrangement you have with a third party would technically be regarded as a professional fundraising or commercial participation arrangement, which would then require it to be in the prescribed form and include the relevant 2016 Act provisions;
- even if a fundraising arrangement does not constitute a professional fundraising or commercial participation arrangement adopt, so far as is relevant, the same legal principles and procedures (including having in place an agreement based on the prescribed form and which includes the relevant 2016 Act provisions); and
- obtain expert advice as considered necessary/appropriate.

3 Data Protection: time to review handling of donors' data

The FR and the CC issued a joint alert on 9 December 2016 following the Information Commissioner's Office ("ICO") investigation into the fundraising practices of two household named charities in relation to their collection, use and storage of donors' data.

The ICO ruled that both charities were in breach of the Data Protection Act 1998 as they had:-

- secretly screened millions of their donors so they could target them for more money (often referred to as “wealth screening”);
- traced and targeted new or lapsed donors by piecing together personal information obtained from other sources; and
- traded personal details with other charities creating a massive pool of donor data for sale.

Donors were not informed of the above practices and so were unable to consent or object.

The charities involved were fined £25,000 and £18,000 respectively. Although the Information Commissioner, Elizabeth Denham, has said that she has exercised her discretion in significantly reducing the level of the fines, the fines still represent a departure from the fact that the ICO has until now not been inclined to use its fining powers against charities. Stephen Dumore, Chief Executive of the FR, said:

“The ICO’s monetary penalty notices for these two charities should be a wake up call to the whole sector. Charities must meet their legal obligations to ensure that they always have the proper consents in place for the use of personal data, both by purpose and communication channel...Achieving compliance with data protection law is now an urgent priority, if charities are to avoid further reputational risk and re-establish public and donor confidence in fundraising.”

Action required?

In addition to reading the CC’s guidance on fundraising CC20, the relevant sections of the Code and the published guidance of the ICO (alongside taking expert advice where necessary), the FR and the CC recommend six steps that charity trustees should now take. Links to the alert and the above guidance are set out below:-

<https://www.fundraisingregulator.org.uk/2016/12/09/regulators-issue-joint-alert-compliance-data-protection-law/>

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

<https://www.fundraisingregulator.org.uk/wp-content/uploads/2016/06/Code-of-Fundraising-Practice-v1-3.pdf> (in particular see section 5 (Fundraising and Communications Techniques))

<https://ico.org.uk/for-organisations/guide-to-data-protection/>

If you require further information or assistance on anything covered in this note please contact Sarah Chiappini (sarah@filanthropia.co.uk).

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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.