

THE GUARDIANS GUARDING THEMSELVES: A COMPARATIVE PERSPECTIVE ON NONPROFIT SELF-REGULATION

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We are witnessing a new wave of nonprofit self-regulation in Asia and the United States that results from government moves to strengthen regulation of nonprofits and charities, and the perceived “failure” of earlier forms of weaker, often code- or “best practice”-based self-regulation. In both Asia and the United States, the new nonprofit self-regulation features multiple models and initiatives, including aggressive associational entrepreneurs who view nonprofit accountability as a type of market and effective self-regulation as a means to prosper in that market. In that new self-regulatory environment, alliance with government to engage in and strengthen self-regulation is increasingly important for multiple reasons: to forestall unilateral regulatory action, to emphasize the role and importance of self-regulation, to provide resources and incentives for stricter self-regulation to take hold and succeed, and to provide resources for initially weak and undercapitalized associational entrepreneurs.

In one sense, the new wave of nonprofit self-regulation supports an earlier analysis of self-regulation: Without effective funding or regulatory incentives—without conditioning either government resources (such as funding for social services or health care) or regulatory action (such as formation approvals or tax exemptions) on compliance with self-regulation

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standards—nonprofit self-regulation may have a general salutary effect on strengthening norms and standards within the nonprofit sector, but it is unlikely to be able to force compliance with norms or to discipline those who violate standards.

In certain fields, that sort of strict, incentive-based, government-allied self-regulation may be appropriate. But as we move toward more detailed and stricter forms of nonprofit self-regulation, we must take care that those stricter, incentive-based, government-allied accountability standards do not prevent smaller or more innovative groups from receiving the financial or regulatory benefits accorded to other nonprofits. We must ensure that stricter self-regulation does not narrow nonprofit autonomy and freedom. And we must be cautious that self-regulation supported and incentivized by government does not become, in effect, a form of government “nationalization” of nonprofit governance and management through an ostensible “self-regulatory” process.

At the same time, the nonprofit and philanthropic sector must indeed find ways to condemn, discipline, and ostracize organizations that violate the norms or ethics of the nonprofit community. The failure to condemn such practices has weakened social support for the nonprofit sector, and that continued failure opens the door to stricter and more pervasive government regulation—and to even greater difficulty in finding a balance between order and freedom, accountability and autonomy, in the American nonprofit sector.

I. INTRODUCTION: NONPROFIT ACCOUNTABILITY AND THE DRIVE FOR SELF-REGULATION

The American nonprofit and philanthropic sector is mired in another of its recurring crises of accountability; the predicament is motivating this symposium.¹ Only a few examples are needed to indicate the scale of the problem, at least in terms of politics and public perception. Some nonprofit leaders and other employees allegedly take unreasonably high salaries,² use nonprofit assets for personal air travel and other personal expenses,³ en-

1. For a recent, general review of accountability debates (though without a focus on self-regulation), see Jon Christensen, *Asking the Do-Gooders to Prove They Do Good*, N.Y. TIMES, Jan. 3, 2004, at B9.

2. This allegedly occurred in the cases of the United Way, the Statue of Liberty Foundation, and the Nature Conservancy. See, e.g., Joe Stephens, *Nature Conservancy Retools Board to 'Tighten' Oversight*, WASH. POST, Mar. 4, 2004, at A21.

3. See, e.g., Jim Rutenberg, *A Foundation Travels Far from Sesame Street*, N.Y. TIMES, Sept. 6, 2002, at C1; Beth Healy et al., *Spotlight Report, Charity at Home: Some Officers of Charities Steer Assets to Selves*, BOSTON GLOBE, Oct. 9, 2003, at A1; Beth Healy et al., *Spotlight, A Lack of Oversight: Foundations' Tax Returns Left Unchecked*, BOSTON GLOBE, Dec. 29, 2003, at A1; Kate Shatzkin,

gage in indefensible sales or loans to officers and executives,⁴ or engage in other forms of self-dealing.⁵ Some charities have failed to respond adequately to federal and state mandates for disclosure of financial and programmatic information.⁶ Others have engaged in the criticized employment of tax shelters,⁷ employed conservation easements and land trusts to avoid both scrutiny and taxation,⁸ used the nonprofit form as credit counseling organizations to cheat consumers,⁹ and participated in charitable fundraising as a vehicle for political donations.¹⁰

All this adds up to a nonprofit accountability problem of visible proportions—though, it must be said, it involves a few rather than most nonprofits. But these issues are not limited to outrageous salaries, self-dealing, and other abuses. The arrogance, insensitivity, and lack of accountability

Board of AIDS Agency Probes Chief's Expenses; Official Fired After Alleging Misuse of Funds at HERO, BALTIMORE SUN, Mar. 20, 2004, at 1B.

4. See, e.g., Harvy Lipman & Grant Williams, *Donors Set Up Grant-Making Groups, Then Borrow Back Their Gifts*, CHRON. PHILANTHROPY, Feb. 5, 2004, at 6; Rafael A. Olmeda & Ivette M. Yee, *Charities' Loans Draw Criticism; Nonprofit Groups' Practice Called Unethical*, SUN-SENTINEL (Fla.), Feb. 13, 2004, at 1B; Jeff Kosseff, *Nonprofit's Loans Scrutinized*, OREGONIAN, June 22, 2004, at D1; Jeremiah Hall, *When Your Donations Fund Insider Perks*, CHRISTIAN SCI. MONITOR, June 21, 2004, at 13.

5. For just a few examples of the many that could be cited, see Nina Bernstein, *Officials Overlooked Dire Signs at Charity*, N.Y. TIMES, Feb. 7, 2002, at B1 (discussing Hale House); Stephanie Strom, *Questions About Some Charities' Activities Lead to a Push for Tighter Regulation*, N.Y. TIMES, Mar. 21, 2004, at 23 (California scandals include a "fund-raiser who pleaded guilty to defrauding high-profile contributors through Hollywood charity galas and to the collapse of a nonprofit group that used donations intended for other charities to cover its own costs"); Pete Slover & Sudeep Reddy, *Scandal Inside Texas Power Grid; Exclusive: Morning News Inquiry Finds Suspect Deals, Insider Intrigue*, DALLAS MORNING NEWS, July 4, 2004, at 1A.

6. See, e.g., Stephen G. Greene, *Ousted Trustees Should Repay \$5 Million to Hawaiian Trust, Report Says*, CHRON. PHILANTHROPY, June 1, 2000, at 32.

7. The June 22, 2004, Senate Finance Committee hearings on nonprofit accountability discussed inappropriate use of tax shelters fairly extensively. See *Charity Oversight and Reform: Keeping Bad Things from Happening to Good Charities: Hearing Before the Sen. Comm. on Finance*, 108th Cong., 3, 30–31, 36–37, 39–41 (2004), available at <http://finance.senate.gov/hearings/95482.pdf> [hereinafter *Charity Oversight and Reform Hearings*]. For an overseas example of the problems tax shelter arrangements can cause, see Peter Watson, *Poisonous Intrigue of a Tycoon's Last Days*, TIMES (London), Apr. 15, 2004, at 8.

8. See, e.g., Stephens, *supra* note 2; Joe Stephens, *Overhaul of Nature Conservancy Urged*, WASH. POST, Mar. 31, 2004, at A1; David B. Ottaway & Joe Stephens, *IRS Toughens Scrutiny of Land Gifts*, WASH. POST, July 1, 2004, at A1.

9. For a recent Congressional staff report on this growing issue, see PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE COMM. ON GOV'T AFFS., *PROFITEERING IN A NON-PROFIT INDUSTRY: ABUSIVE PRACTICES IN CREDIT COUNSELING* (Mar. 24, 2004), available at http://hsgac.senate.gov/_files/032404psistaffreport_creditcounsel.pdf. The current IRS guidance for determining when credit counseling organizations should lose their nonprofit status is DAVID L. MARSHALL, INTERNAL REVENUE SERV., ILM 2004431023, MEMORANDUM: CREDIT COUNSELING ORGANIZATIONS (July 13, 2004), available at <http://www.irs.gov/pub/irs-wd/0431023.pdf>.

10. See, e.g., Rick Cohen, *Giving That's All About Getting*, WASH. POST, June 6, 2004, at B1. A number of these matters are discussed at length in the June 2004 Senate Finance Committee hearings on charity oversight and reform. See *Charity Oversight and Reform Hearings*, *supra* note 7.

that these reports reveal in a few nonprofits and foundations have also sparked increasingly direct resistance from both recipients of charitable funds and from donors.

A few examples of that resistance show that both recipients and donors are beginning to challenge, in increasingly open ways, what they perceive to be nonprofits' lack of accountability. Poor Hispanic farm workers and Native American residents of eastern Washington State sued the Northwest Area Foundation when the Foundation refused to pay expenses promised to the workers.¹¹ Hershey Foods workers, retirees, executives, and community members took to the streets when the charitable trust that controls Hershey Foods decided to diversify its holdings away from a concentration in Hershey Foods stock, prompting action by the state legislature, Attorney General, and a local judge who eventually barred the company's sale.¹² Residents of the tiny Montana community of Martinsdale went to court to prevent the trust controlling one of America's great house museums from breaking up and sending away a collection of French, American, and Native American art.¹³ In Cleveland, Princeton, and elsewhere, angry

11. It is important to note that the Yakima farmworkers did not sue for the \$15 million grant discussed and worked on (for several years) with the Northwest Area Foundation. All agree that such an action would quickly and rightly have been thrown out of court. They sued instead for \$1.25 million of expenses allegedly promised and the time and effort they spent on studies commissioned by the Northwest Area Foundation. On this dispute, see Minnesota Council on Foundations, *Northwest Area Foundation Concludes Yakima Valley Exploration Planning*, at <http://www.mcf.org/mcf/whats-new/archives/August2002/nwaf020827.htm> (Aug. 27, 2002); Robert Franklin, *Foundation Sued for Pulling Out of Antipoverty Plan*, STAR-TRIB. (Minneapolis), Dec. 5, 2002, at 4B; Stephen G. Greene, *Prospective Grantees Take Foundation to Court and Ask for \$1.25-Million*, CHRON. PHILANTHROPY, Dec. 12, 2002, at 7; Stephanie Strom, *A Withdrawn Aid Offer Leaves Yakima Bruised*, N.Y. TIMES, Mar. 6, 2003, at A20; Paul Demko, *Something for the Little People; The Twin Cities-based Northwest Area Foundation has a \$450 Million Endowment to Use on Charitable Programs. So Why Has It Been Nearly Invisible for Years?*, CITY PAGES (Minneapolis), May 28, 2003, at 13, available at <http://www.citypages.com/databank/24/1173/article11271.asp>; Linda Ashton, *Yakima Residents Suing Charity*, SEATTLE TIMES, June 1, 2003, at B7; Linda Ashton, *A Promise to Fight Poverty Goes Unfulfilled*, COLUMBIAN (Vancouver, Wash.), June 1, 2003, at C2; *Romero v. Northwest Area Found.*, No. CY-02-3135-EFS (E.D. Wash. Aug. 18, 2003) (order granting defendant's motion to dismiss); Ian Wilhelm, *Judge Dismisses Lawsuit Against Minnesota Foundation*, CHRON. PHILANTHROPY, Sept. 4, 2003, at 19.

12. On the Hershey saga, see Mark Sidel, *The Struggle for Hershey: Community Accountability and the Law in Modern American Philanthropy*, 65 U. PITT. L. REV. 1 (2003). That article cites to the excellent coverage of the Hershey case in the Patriot-News (Harrisburg, Pa.), New York Times, and other publications.

13. On the Bair Museum dispute, see Jim Gransbery, *Bair Museum Won't Reopen*, BILLINGS GAZETTE (Mont.), Feb. 4, 2003, at 1C; Stephanie Strom, *Once a Home, Now a Museum of Fate Unknown*, N.Y. TIMES, Apr. 2, 2003, at A10; James P. Roscoe, *Guest Opinion: Bair Trust Goals for Charity, Museum Must Be Weighed*, BILLINGSGAZETTE.COM (Mont.), May 3, 2003, available at <http://www.billingsgazette.com/index.php?id=1&display=rednews/2003/05/03/build/opinion/guest.inc>; Associated Press, *Built on Philanthropy, Montana Museum's Future Now in Jeopardy*, NEWS-STAR.COM (Okla.), May 31, 2003, available at http://www.news-star.com/stories/053-103/New_10.shtml.

donors have suspended their grantmaking¹⁴ or sued for return of funds or other remedies¹⁵ when recipient organizations fail, in the donors' perceptions, to remain accountable for the use of funds.

There have been two broad, traditional responses to the recurring accountability crises of America's nonprofits. The first is stricter federal and state regulation of the nonprofit sector, through increased requirements for transparency and disclosure and enhanced regulation of compensation, the auditing process, the use of assets for personal gain, and other problematic areas.

The most recent accountability crisis has, for example, provoked staff proposals in Congress that would tighten exempt status (including mandating the review of nonprofits' tax-exempt status every five years, tightening requirements for donor-advised funds and eliminating certain supporting organizations, significantly restricting the exemption standards for credit counseling organizations, and tightening nonprofit tax shelters), as well as reform insider and disqualified person rules (including applying the stricter private foundation self-dealing rules to public charities; expanding the definition of disqualified persons; increasing taxes for self-dealing, jeopardizing investments, and taxable expenditures; prohibiting or limiting compensation of private foundation trustees; and limiting compensation of disqualified persons).¹⁶

The most recent Congressional staff proposals would also reform grantmaking and foundation expenses (including seeking to limit foundation administrative expenses; incentivizing additional grantmaking; and limiting travel, meals, and accommodation expenses). They would strengthen federal-state regulatory coordination (including setting standards for review of acquisitions or conversions of nonprofits by for-profits and providing states with authority to pursue federal tax violations by nonprofits), and strengthen disclosure and transparency (by improving the Forms

14. Steven Litt, *Billionaire Blasts CWRU Board, Halts Charitable Gifts Across City*, PLAIN DEALER (Cleveland), June 6, 2002, at A1; John L. Pulley, *Money Talks, More So When It Walks*, CHRON. HIGHER EDUC., Oct. 25, 2002, at A29; Susan Ruiz Patton, *Lewis Will Open Wallet if Nonprofits Work Jointly*, PLAIN DEALER (Cleveland), Dec. 6, 2003, at B1; Sarah Hollander, *Lewis Says He'll Take Lock Off Pocketbook*, PLAIN DEALER (Cleveland), Nov. 8, 2003, at A1.

15. See, e.g., Stephen G. Greene, *Seeking Control in Court*, CHRON. PHILANTHROPY, Nov. 28, 2002, at 6; Stephanie Strom, *Donors Add Watchdog Role to Relations with Charities*, N.Y. TIMES, Mar. 29, 2003, at A8; Jessica Bruder, *Give Us Back the Money, Heirs Tell Princeton*, N.Y. TIMES, June 20, 2004, § 14NJ, at 3; Dahleen Glanton, *Old South Rises to Save Symbols; Fight for Heritage vs. Sensitivities*, CHI. TRIB., Nov. 18, 2002, at 1.

16. STAFF OF SENATE COMM. ON FIN., 108TH CONG., STAFF DISCUSSION DRAFT 1-5 (2004), at <http://finance.senate.gov/hearings/testimony/2004test/062204stfdis.pdf> [hereinafter STAFF DISCUSSION DRAFT]. For an initial response from the nonprofit community, see PANEL ON THE NONPROFIT SECTOR, INTERIM REPORT PRESENTED TO THE SENATE FINANCE COMMITTEE (March 1, 2005), at <http://www.nonprofitpanel.org/interim/PanelReport.pdf>.

990, financial statements, and filing duties; providing penalties for incomplete or inaccurate federal disclosures; requiring independent audits of nonprofits with over \$250,000 in gross receipts; requiring more transparent disclosure of related organizations and insider transactions; and requiring public disclosure of financial statements). The proposals also would strengthen nonprofit governance (by strengthening board duties, enhancing independent board composition, making board removal easier, and beginning a national accreditation process), as well as funding state oversight and enforcement of exempt organizations.¹⁷

Accountability issues have also provoked proposals for stricter state regulation. Perhaps most prominent is Attorney General Eliot Spitzer's proposed extension of Sarbanes-Oxley to nonprofits in New York, which would require nonprofit officer verifications of reporting data (like those that must be provided by officers of public companies under Sarbanes-Oxley), to tighten regulation of nonprofit board and committee structures, expand required audits for some larger nonprofits, and strengthen self-dealing rules.¹⁸ But New York is not the only state active in this area. Legislation pending in Massachusetts "would require charity and foundation executives to certify the accuracy of their financial statements, create independent audit committees at nonprofit groups with more than \$750,000 in revenue, and maintain tighter control over compensation, among other things."¹⁹ Similar legislation is pending in California.²⁰

The second response to these accountability problems has been to try to turn to self-regulation, toward a variety of attempts by the nonprofit and

17. *Id.* at 5–16. The staff recommendations would also vest equity powers in the Tax Court and allow private actions by nonprofit directors/trustees and private relator actions by individuals. *Id.* at 16–18.

18. See Dana Brakman Reiser, *Enron.org: Why Sarbanes-Oxley Will Not Ensure Comprehensive Nonprofit Accountability*, 38 U.C. DAVIS L. REV. 205 (2004); Dana Brakman Reiser, *There Ought to Be a Law: The Disclosure Focus of Recent Legislative Proposals for Nonprofit Reform*, 80 CHI.-KENT L. REV. 559 (2005) [hereinafter Brakman Reiser, *There Ought to Be a Law*]. Sarbanes-Oxley has been an important recent spur to self-regulation, as BoardSource and Independent Sector indicate:

[W]e have heard the wake-up call. For all of us in the sector, the Sarbanes-Oxley Act has caused a renewed realization that nonprofit organizations rely on—and must protect—the indispensable and unequivocal confidence and trust of our constituents. Self-regulation and proactive behavior will always prove more powerful than compulsory respect of laws.

BOARDSOURCE & INDEP. SECTOR, *THE SARBANES-OXLEY ACT AND IMPLICATIONS FOR NONPROFIT ORGANIZATIONS* 10 (2003), at <http://www.independentsector.org/PDFs/sarbanesoxley.pdf>. For other summaries, see Michael Anft & Grant Williams, *States Propose New Accountability Regulations for Nonprofit Groups*, CHRON. PHILANTHROPY, Aug. 19, 2004, at 8; Michael Anft & Grant Williams, *Redefining Good Governance*, CHRON. PHILANTHROPY, Aug. 19, 2004, at 6.

19. Strom, *supra* note 5. Brakman Reiser discusses the Massachusetts legislation in some detail in *There Ought to Be a Law*, *supra* note 18. See also Michael Rezendes & Sacha Pfeiffer, *Legislation Eyed to Fight Abuses at Foundations*, BOSTON GLOBE, Mar. 1, 2004, at A1.

20. Brakman Reiser, *There Ought to Be a Law*, *supra* note 18, discusses the California legislation.

philanthropic sector to control its own behavior, strengthen standards, and increase transparency through its own efforts.

Nonprofit self-regulation efforts have had two overlapping goals. One is functional—improving the effectiveness of nonprofit activity through higher standards, enhanced transparency, improved operations, community building, and stronger learning processes. The second is essentially political—improving nonprofit credibility (partly through functional and substantive improvements, to be sure) and, crucially, forestalling enhanced federal and state regulation of the nonprofit sector. In the literature on these questions there is a sense that nonprofit self-regulation, at least in the United States, has played a role in encouraging higher standards but has not had the incentives or enforcement mechanisms available to deal with significant problems and violations.²¹

This Article deals with those newer, intensified efforts to develop nonprofit self-regulation. I suggest that even the “weaker,” “best practices” forms of nonprofit self-regulation in the United States and Asia play a useful role in strengthening nonprofit standards. I also seek to identify some of the newer features of the current wave of self-regulatory initiative in the United States as well as in Asia: the emergence of newer “associational entrepreneurs” (in competition with the traditional “trade associations” such as Independent Sector and the Council on Foundations) that seek to satisfy a social and market need for better self-regulation, experimentation with forms of incentives to encourage compliance with self-regulatory norms, and alliance with government to put those incentives in place and to establish a stronger political basis for self-regulation.

But this Article first begins abroad, in Asia, with a comparative approach to nonprofit self-regulation. We start outside the United States to avoid the usual pattern of comparing the foreign to a domestic, American model. That mode of research has been at work in the nonprofit arena as well, where a standard research paradigm has been to compare foreign

21. There is substantial literature on nonprofit self-regulation in the United States. For useful work, see, for example, David C. Hammack, *Accountability and Nonprofit Organizations: A Historical Perspective*, 6 *NONPROFIT MGMT. & LEADERSHIP* 127 (1995); Laura B. Chisolm, *Accountability of Nonprofit Organizations and Those Who Control Them: The Legal Framework*, 6 *NONPROFIT MGMT. & LEADERSHIP* 141 (1995); *BEYOND THE MAGIC BULLET: NGO PERFORMANCE AND ACCOUNTABILITY IN THE POST-COLD WAR WORLD* (Michael Edwards & David Hulme eds., 1996); Robert O. Bothwell, *Trends in Self-Regulation and Transparency of Nonprofits in the U.S.*, 2 *INT’L J. NOT-FOR-PROFIT L.* (2000), at http://www.icnl.org/JOURNAL/vol2iss3/Arn_bothwell.htm; PAUL C. LIGHT, *MAKING NONPROFITS WORK* (2000); Angela L. Bies, *Accountability, Organizational Capacity, and Continuous Improvement: Findings from Minnesota’s Nonprofit Sector*, 31 *NEW DIRECTIONS FOR PHILANTHROPIC FUNDRAISING* 51 (2001); Evelyn Brody, *Accountability and Public Trust*, in *THE STATE OF NONPROFIT AMERICA* 471 (Lester M. Salamon ed., 2002).

experience to a U.S. model that is assumed to be at least more complete, and usually, somehow, better.

Here, we reverse that paradigm by first seeking to draw some lessons from the Asian experience, by analyzing several energetic initiatives to build nonprofit self-regulation in Asia, where the nonprofit and philanthropic sector has also grown rapidly in recent decades. The discussion of the Asian experience with nonprofit self-regulation is based on research done with the support of the Asia Pacific Philanthropy Consortium (“APPC”) and utilizes data gathered from the first significant survey of nonprofit self-regulation conducted in Asia. That report uncovered literally dozens of codes of conduct and ethics, disclosure mechanisms, certification and validation schemes, ratings exercises, accounting and organizational standards, and other self-regulation initiatives underway throughout the region.²²

This analysis of nonprofit self-regulation in Asia is intended to shed greater light and enhance transparency in a sector regarded throughout Asia as lacking in transparency, and to light the path toward substantive improvement in nonprofit operations and effectiveness. In political terms, the primary goal is to forestall even greater government regulation, usually at the national level, and to strengthen the public and political credibility of a sector regarded, again virtually throughout Asia, as a haven of murky deals, unsavory connections to government, and often unabashed commerciality. These comparisons from and to Asia are not intended to give short shrift to other important comparative perspectives, including the recent focus on nonprofit self-regulation in the United Kingdom,²³ Australia,²⁴ and Canada,²⁵ among other countries.

22. MARK SIDEL, TRENDS IN NONPROFIT SELF-REGULATION IN THE ASIA PACIFIC REGION: INITIAL DATA ON INITIATIVES, EXPERIMENTS AND MODELS IN SEVENTEEN COUNTRIES (2003) (research report prepared for the Asia Pacific Philanthropy Consortium and the International Symposium on Nonprofit Accountability (Manila, Sept. 2003)), available at www.asianphilanthropy.org/staging/about/NonprofitSelfRegulation.pdf and <http://myweb.uiowa.edu/sidel/>.

23. In its 2002 report *Private Action, Public Benefit*, the Prime Minister’s Strategy Unit strongly encouraged self-regulation among fundraisers, where the need for accountability was perceived to be a particular problem. But that was coupled with a distinct threat:

It was clear from our consultations that fundraising organisations favour self-regulation, in contrast to the public appetite for stronger legal regulation. The Government considers that a self-regulatory scheme which the sector itself helps to set up and run has the best chance of success. This new scheme would build on the valuable work, including work on codes of good practice, already undertaken by organisations such as the Institute of Fundraising and the Public Fundraising Regulatory Association (PFRA). However, if self-regulation is not successful, the Home Secretary should have a back-up power to introduce a system of statutory regulation.

PRIME MINISTER’S STRATEGY UNIT, PRIVATE ACTION, PUBLIC BENEFIT; A REVIEW OF CHARITIES AND THE WIDER NOT-FOR-PROFIT SECTOR §§ 6.29, 6.30 (Sept. 2002), available at <http://www.number-10.gov.uk/su/voluntary/report/index.htm>. The Institute of Fundraising (U.K.) has now proposed a self-

So, in short, this Article focuses on three themes in considering the newer wave of nonprofit self-regulatory activities:

A. *The New Self-Regulatory “Associational Entrepreneurship”*

Newer nonprofit self-regulatory initiatives in Asia and the United States are increasingly diverse, going well beyond traditional code- or best practices-based approaches in organizations such as nonprofit trade groups. A new set of institutional players has arrived on the scene: Many of the newer nonprofit self-regulatory initiatives are led by what I term “associational entrepreneurs.” These are organizations that have stepped into the underserved market of nonprofit accountability and have sought to contribute to society and to grow their institutions by serving that market, often aggressively and with government backing, with new or improved forms of self-regulation.

regulatory mechanism through an independent report, and the Charities Aid Foundation is exploring implementation. See RODNEY BUSE, THE FUTURE OF SELF-REGULATION OF CHARITY FUNDRAISING, PHASE 2 REPORT, PROPOSED FRAMEWORK AND GOVERNANCE STRUCTURE (Jan. 2004), available at <http://www.institute-of-fundraising.org.uk/documents/Buse%20Commission%20final%20report.doc>; <http://www.busecommission.org.uk/public/docs/Buse%20Commission%20Phase%20%20Report.pdf>. My thanks to Debra Morris for this information.

For a historical perspective on self-regulation in the U.K., see also DIANA LEAT, VOLUNTARY ORGANISATIONS AND ACCOUNTABILITY (London, NCVO, 1988); Diana Leat, *Are Voluntary Organisations Accountable?*, in VOLUNTARY AGENCIES: CHALLENGES OF ORGANISATION AND MANAGEMENT 61 (David Billis & Margaret Harris eds., 1996); Margaret Harris, *Voluntary Sector Governance—Problems in Practice and Theory in the United Kingdom and North America*, in INTERNATIONAL PERSPECTIVES ON VOLUNTARY ACTION: RESHAPING THE THIRD SECTOR 97 (David Lewis ed., 1999); HELMUT K. ANHEIER, NONPROFIT ORGANIZATIONS: THEORY, MANAGEMENT, POLICY (2005).

24. For a very brief summary of the Australian scene, see SIDEL, *supra* note 22. For details, see Maureen Cleary, *Australia: The Role and Influence of the Nonprofit Sector in Australia*, in GOVERNANCE, ORGANIZATIONAL EFFECTIVENESS AND THE NONPROFIT SECTOR 18 (2003) (collection of reports prepared for the September 2003 Asia Pacific Philanthropy Consortium conference), available at <http://www.asianphilanthropy.org/staging/about/AUSTRALIA1.pdf>; AUSTL. COUNCIL FOR INT’L DEV., ACFID CODE OF CONDUCT FOR NON GOVERNMENT DEVELOPMENT ORGANISATIONS (amended Oct. 5, 2004), available at http://www.acfid.asn.au/code/Code_of_Conduct.htm; PHILANTHROPY AUSTL., CODE OF PRACTICE (Apr. 24, 2002), available at www.philanthropy.org.au/about/code.htm; Fundraising Inst. Australia, *Code of Professional Conduct & Ethics; Individual Members*, at http://www.fia.org.au/Content/NavigationMenu/About1/Code_of_Ethics/Codes_of_Conduct.pdf (last visited Mar. 6, 2005); Peter Carroll & Myles McGregor-Lowndes, *A Standard for Regulatory Compliance? Industry Self-Regulation, the Courts and AS3806-1998*, 60 AUSTL. J. PUB. ADMIN. 80 (2001); CHARITIES DEFINITION INQUIRY, COMMONWEALTH OF AUSTL., REPORT OF THE INQUIRY INTO THE DEFINITION OF CHARITY AND RELATED ORGANISATIONS ch. 32, at 275 (2001), available at <http://www.cdi.gov.au/html/report.htm>.

25. Chris Miller, *Toward a Self-Regulatory Form of Accountability in the Voluntary Sector*, 30 POL’Y & POL. 551 (2002).

B. The New Alliances with Government and the Motivations for Alliance

Second, those newer initiatives, in Asia and the United States, now explicitly seek to build alliances between the sector and government institutions to strengthen the force of the new self-regulatory initiatives and mechanisms. Those new alliances have multiple motivations: forestalling new regulation, strengthening the political position of the nonprofit sector, and bolstering—through endorsement, funding, or required compliance—the particular self-regulation initiatives of the new nonprofit “associational entrepreneurs.” Thus the new alliance with government is a matter of defense, of political sense, and of organizational strategy.

*C. Parsing Success and Failure in Nonprofit Self-Regulation:
The Key Role of Incentives*

Third, but closely related to the first two themes, new nonprofit self-regulatory initiatives in Asia and the United States have certainly had some success in extending and strengthening aspirational norms and standards within the nonprofit community. Where they are pitched broadly—across the entire nonprofit sector, for example, or an entire country, or where they are not specifically tied to powerful significant incentives (such as government funding or the availability of important government action such as approval of formation or tax incentives)—they continue to have important norm-strengthening functions but are very hard to enforce, and they increasingly fail to satisfy government’s demands for nonprofit accountability.

To put it more plainly, this Article employs emerging evidence in Asia and in the United States to show that a new wave of nonprofit self-regulation is taking root, a wave that features aggressive associational entrepreneurs who view nonprofit accountability as a market to enter and effective self-regulation as a means to prosper in that market. In that new environment for nonprofit self-regulation, alliance with government is increasingly important to forestall unilateral regulatory action, to emphasize the role and power of self-regulation, and to provide resources for initially weak and undercapitalized associational entrepreneurs. Additionally, the new focus on nonprofit self-regulation supports an older theme: without effective funding or regulatory incentives—without conditioning either government resources or regulatory action (such as formation approvals or tax exemptions) on compliance with self-regulation standards—nonprofit self-regulation may have a general salutary effect in strengthening norms

and standards within the nonprofit sector, but it is unlikely to be able to force compliance with norms or to discipline those who violate standards.

II. NONPROFIT ACCOUNTABILITY IN ASIA AND THE AMBIGUOUS PROMISE OF SELF-REGULATION

Nonprofit accountability is an issue in Asia as well as in the United States. Throughout Asia, government attempts to force responsiveness in the nonprofit sector and, in some cases, media exposure of nonprofit excesses have produced an environment of a conflicted state—a state that seeks both to regulate nonprofits in order to prevent accountability abuses that are then at least partly blamed on regulators and a state that increasingly understands that the heavy hand of regulation is not conducive to nonprofit effectiveness and creative responses to social problems, promotion and protection of arts and culture, advocacy, and other nonprofit tasks.²⁶

Self-regulation, as a response to accountability issues, has grown in use throughout Asia as well. It is a first and experimental wave of efforts, intended to defend against more rigorous government regulation and to respond to criticism from the public, media, regulators, and others. Nonprofit self-regulation in Asia has also strengthened new associational entrepreneurs, built alliances and community within the nonprofit sector, and strengthened ties to sympathetic government regulators in what are often difficult environments for the nonprofit sector.

The current and first wave of nonprofit self-regulation in Asia includes a diverse array of forms, as the nonprofit sector in each country discusses, debates, experiments with, and adopts self-regulation structure at its own pace and based on its own conditions and needs.²⁷ That complex and exciting picture includes:

1. *Formal accreditation, certification, validation, and licensing mechanisms;*
2. *Evaluative mechanisms* (such as ratings, grading, and scoring systems);

26. On the problem of the conflicted state in nonprofit-state relations in Asia, see the country studies in *PHILANTHROPY AND LAW IN SOUTH ASIA* (Mark Sidel & Iftekhar Zaman eds., 2004); *PHILANTHROPY AND LAW IN ASIA* (Thomas Silk ed., 1999), as well as the superb review in Barnett F. Baron, *The Legal Framework for Civil Society in East and Southeast Asia*, 4 *INT'L J. NOT-FOR-PROFIT L.* (July 2002), at http://www.icnl.org/journal/vol4iss4/ar_baronprint.htm. For specific treatment of the context of state restrictions on foreign funding and state policy toward the commercial activities of nonprofits, see Mark Sidel, *States, Markets, and the Nonprofit Sector in South Asia: Judiciaries and the Struggle for Capital in Comparative Perspective*, 78 *TUL. L. REV.* 1611 (2004).

27. See SIDEL, *supra* note 22, at 2.

3. *Codes* and other means to govern and improve conduct (such as codes of conduct or ethics of various kinds);
4. “*Intranet*” *self-regulatory measures within nonprofit networks* or precursors to self-regulation in which domestic funding nonprofits encourage and require compliance with standards by their domestic partners, grantees, or both;
5. *Proposals for charity commissions or self-regulatory charity registers*; and
6. Other forms of self-regulation.

Self-regulation in Asia, as in the United States, seeks “to regulate highly diversified matters: nonprofit governance, transparency and information flows; conduct of directors, trustees and officers; fundraising; investment of donated funds; and a host of other important matters.”²⁸ While there are self-regulatory initiatives underway throughout Asia, many are very new and generally limited. But in two countries—India and the Philippines—there have been a number of experiments, models, and initiatives in nonprofit self-regulation. These two countries also exhibit strikingly different patterns of nonprofit-state relations and therefore of the nature of the law that governs nonprofit institutions.²⁹

III. INDIA

A. *The Diversity of Self-Regulatory Experiments in India*

India has one of the world’s largest and most diverse nonprofit sectors, and nonprofit self-regulation has been an area of discussion in India for some years. In the mid-1980s, the nonprofit sector activist Bunker Roy and others pressed for development of a code of conduct for the voluntary sector, an effort that was resisted by some nonprofits and supported by others.³⁰ In the 1990s, a number of experiments were conducted in nonprofit self-regulation, including several efforts to encourage softer, non-

28. *Id.*

29. For the full range of efforts underway in Asia, see *id.*; RAJESH TANDON, VOLUNTARY ACTION, CIVIL SOCIETY AND THE STATE (2002); RAJESH TANDON & RANJITA MOHANTY, CIVIL SOCIETY AND GOVERNANCE (2002); Sanjay Agarwal & Noshir Dadrawala, *Philanthropy and Law in India*, in SIDEL & ZAMAN, *supra* note 26; Sidel, *supra* note 26.

30. On Roy, see Neelesh Misra, *India’s Barefoot College Generation*, UNESCO COURIER, Mar. 2000, at 19. On the self-regulatory efforts practiced by the organization he is most closely associated with, the “Barefoot College” of Tilonia, see Barefoot College, at <http://www.barefootcollege.org/html/action.htm> (last visited Mar. 7, 2005). For some of his views, see Bunker Roy, *Transparency in the Voluntary Sector: A First Step*, ECON. & POL. WEEKLY (Bombay), Nov. 29, 1997. I am grateful to Bunker Roy for discussion of these issues.

mandatory forms of self-regulation. A nonprofit resource center, Murray Culshaw Advisory Services (Bangalore) (“MCAS”), encouraged nonprofits to increase informational transparency to the public, donors, and the media through more informative annual reports. MCAS issued several publications on producing effective annual reports, several evaluations of nonprofit sector annual reports, and at least one scorecard of effective annual reports.³¹ Similarly the Indian Centre for Philanthropy (based in Delhi) and the Centre for Advancement of Philanthropy (Bombay) encouraged early standard setting amongst the small but diverse and independent group of indigenous Indian funders.³²

A separate early strand emphasized nonprofit-government alliance to promote government-backed forms of self-regulation. Early proposals for a “charity commission” adapted from the English model fit within this type of mixed state-voluntary regulatory model, in which sectoral norms are backed up by the threat of government sanction—and in which the government is a political ally of self-regulation.³³

In the early 1990s, a third strand emphasized the development of codes of conduct and their use in the nonprofit community. One effort was the development of “voluntary guiding principles” for the nonprofit sector by Voluntary Action Network India (“VANI”). Another strand emphasized joint nonprofit-government attempts to “validate” nonprofits—a weak form of accreditation—through a joint project on nonprofit information disclosure and validation conducted by the Charities Aid Foundation/India and the Government of India’s Planning Commission, and other initiatives.³⁴ Additionally, since 2001, another effort has been underway to build on the earlier experiments, unite significant elements of the nonprofit sector in support of a form of self-regulation, and come to agreement on a code of conduct and related measures.

The current Indian attention to nonprofit self-regulation reflects concern about government scrutiny, both at the federal and state levels; a per-

31. For further information about some of these materials, see Murray Culshaw Consulting, *Research Reports*, at www.fundraising-india.org/mccshop/researchreports/ (last visited Mar. 7, 2005).

32. See Sampradaan Indian Centre for Philanthropy, at <http://www.sampradaan.org> (last visited Mar. 7, 2005); Centre for Advancement of Philanthropy, at <http://www.capindia.org> (last visited Mar. 7, 2005). I am grateful to the Centres’ respective directors, Pushpa Sundar and Noshir Dadrawala, for extensive discussions of these issues.

33. The eminent Pushpa Sundar at the Sampradaan Indian Centre for Philanthropy is perhaps most closely associated with this approach.

34. This complex history was reviewed briefly by Anil Singh of VANI at several of the Credibility Alliance regional meetings in 2002 and 2003. See, e.g., CREDIBILITY ALLIANCE, CONSENSUS BUILDING WORKSHOP ON GOOD GOVERNANCE AND ENHANCING CREDIBILITY OF THE VOLUNTARY SECTOR IN DELHI (Feb. 11, 2003), available at http://www.credibilityalliance.org/regional_meetings/rw_11022003_delhi.pdf.

ceived distrust of the nonprofit sector among the public, government, and media; and a distinct concern in the sector about that perception. But some of these efforts have also been intended to bolster the role of self-regulatory nonprofit entrepreneurs, to seek political and financial support from the government for organizations that promote self-regulation, to develop an alliance between more liberal sectors of the government with elements of the nonprofit sector that support self-regulation, and to promote the use of incentives in strengthening self-regulation.

These four newer features—self-regulation in the service of nonprofit entrepreneurship, seeking government support for self-regulation and its core organizers, building an alliance between nonprofit-friendly forces in the government and the sector, and bringing incentives into the process—are key elements of the Indian focus on self-regulation.³⁵ The results, so far, are mixed: there has been some success in strengthening understanding of norms and standards within a range of nonprofits. But in the absence of very strong incentives for self-regulation (such as tying self-regulation to government funding or to necessary government action such as approval of formation or tax exemptions), most Indian nonprofit self-regulatory initiatives have gradually weakened.

B. Associational Entrepreneurship and Political Alliances with Government

In the late 1990s, Voluntary Action Network India, a network of progressive Indian nonprofit organizations, adopted a set of “guiding principles” for Indian voluntary development organizations, a kind of “code of conduct.” The principles stipulated the characteristics, mission, governance, values, organizational integrity, accountability, transparency, and financial management for nonprofits. A “membership review committee” composed of VANI organizational members was to review member organizations’ compliance with the principles.³⁶ This was a reasonably explicit attempt both to build self-regulation and to strengthen the umbrella organization conducting the process—organizational self-interest combined with a social and market need. But in the absence of clear incentives for non-

35. I am grateful to Sanjay Agarwal, Niloy Banerjee, Mathew Cherian, Noshir Dadrawala, Priya Viswanath, Gopa Kumar, and other Indian friends for discussions of the complex trail of experiments in nonprofit self-regulation in India.

36. For the text of the code, see VOLUNTARY ACTION NETWORK INDIA, VOLUNTARY DEVELOPMENT ORGANIZATIONS, THE GUIDING PRINCIPLES (1999). See references to the principles in CREDIBILITY ALLIANCE, WORKING GROUP FOR ENHANCING CREDIBILITY OF THE VOLUNTARY SECTOR, MINUTES OF MEETING: FIRST DRAFT (Dec. 17, 2001), at http://credibility-alliance.org/core_group/rw_17122001_draft_document_%20after_meeting.pdf.

profits to buy into the “guiding principles”—neither government sanction for the principles, nor other incentives—maintaining, expanding, and sustaining use of this code was problematic. It gradually faded from the Indian scene. While the umbrella organization remains active, it was not strengthened for the long term by the self-regulation initiative.

A different effort, focused on both market entrepreneurship in self-regulation and political alliance with government, was mounted in the late 1990s by another key associational umbrella, the Indian branch of the U.K.’s Charities Aid Foundation (“CAF”), in alliance with a wing of the government generally sympathetic to the nonprofit sector, the Planning Commission of India. Carefully avoiding conflict-laden terms such as “evaluation” or “accreditation,” CAF and the Planning Commission sought to “validate” a range of nonprofit organizations in a relatively nonevaluative framework. CAF India and the Planning Commission worked together for several years to develop a database of approximately 1,500 nonprofits, with data provided by the organizations. The organizations were then “validated” by CAF India, and the list of validated organizations and data were then made available to government and private funders on the web and in CD format. The program ended in 2002.³⁷

CAF and Planning Commission organizers noted several strengths—organizational self-reporting, a reasonably clear validation decision, and fairly widespread information—about the exercise and the organizations participating. Identified weaknesses included problems of sustainability, the verification of organizational data, difficulty in tracking changes in organizations, difficulties in measuring the impact of organizations and programs, and the relatively small sample of participating organizations (relative to the scope of India’s nonprofit sector). But there were other purposes here as well, including bolstering the entrepreneurial role of CAF India as an umbrella representative of some Indian nonprofits, and seeking to ally constructively with a sympathetic government entity to forestall stricter accountability rules.³⁸

37. See MATHEW CHERIAN, FINAL REPORT OF THE PILOT PROJECT ON VALIDATION OF NGOS IN INDIA (Apr. 2001), available at <http://164.100.97.14/ngo/cafreportasp.asp> for information on the CAF/Planning Commission validation initiative, and Charities Aid Foundation, *Ranking/Validation of VOs by CAF-INDIA*, at <http://164.100.97.14/ngo/cafmain.asp> (last visited Mar. 7, 2005) for the list of validated organizations.

38. Another umbrella association, IndianNGOs.com, a for-profit organization supporting nonprofit activities in India, has performed credit ratings on some Bombay- and Maharastra-based nonprofits since February 2001. The ratings are based on “organizational systems, governance, programmes & services, and financial aspects.” CREDIBILITY ALLIANCE, *supra* note 36. IndianNGOs.com has developed parameters within each category and gathers data; an independent board of twelve corporate, nonprofit, academic, and legal members determines the rating. This program has not yet had a particularly wide scope but also seems in part intended to strengthen the role of the new entrepreneurial self-

C. *Restricting Access: Self-Regulation as a Market-Limiting Device*

Another theme at work in India is to limit nonprofits' access to donor and government funds through self-regulatory mechanisms. We have several examples in India of the use of self-regulation to maintain boundaries to entry into specific fields of nonprofit activity and to limit the number of nonprofit providers to donors. For example, an Indian microfinance institution, Micro-Credit Ratings International Ltd. ("M-CRIL"), has developed a process for evaluating and rating microfinance institutions that includes thirty indicators on management and staff systems, governance, and financial issues. That rating mechanism is now being applied—at least on an initial basis—in India. Although information is sparse, it appears that an M-CRIL Indian affiliate sends out a rating field team that reviews the records of microfinance institutions, conducts interviews, and assigns a "relative grading" that reflects a risk assessment as well as an assessment of capacity needs.³⁹ The ratings are reviewed on an annual basis.⁴⁰

This is self-regulation as a market-limiting device, particularly in a field dominated by foreign donors and government agencies concerned about effectiveness and increasingly convinced that that microfinance effectiveness can be measured in quantitative terms.

D. *"Intranet Self-Regulation": Finding Incentives Within Limited Networks, Strengthening the Power of Intermediary Funders, and Strengthening Intermediaries' and Recipients' Accountability*

India and a number of other countries have strong intermediary funders—generally large NGOs or local philanthropic foundations that *receive* funds from domestic or foreign governments, multilateral or private donors, or domestic or foreign individuals, and then *channel* (regrant) those funds to multiple smaller NGOs or other service providers within the country. The original donors (both institutional and increasingly individual) demand some accountability from the intermediary on the onward use of the funds. In turn the intermediary NGO or foundation demands accountability from the smaller NGOs to which it gives. That demand for accountability can lead to domestic self-regulation mechanisms that apply within only a certain network of NGOs—those that receive funds from a particular interme-

regulation association in a crowded field of umbrella groups. *Id.* (Information provided by IndianNGOs.com and derived from the IndianNGOs.com reports to the Credibility Alliance, 2001 and 2002.).

39. *Id.*

40. *Id.*

diary donor. I have called this “intranet self-regulation” to emphasize the extension of norms and standards within closed systems of donors and grantees.

One such Indian intermediary is the national NGO Child Relief and You (“CRY”), which takes in donations from individual donors at home and abroad (including substantial funds from Indians abroad, usually called NRIs or nonresident Indians). CRY does not generally conduct its own service programs for Indian children and families. Instead it devolves funds and programs to a series of several hundred smaller Indian NGOs around the country.

CRY has established a set of procedures and expectations on program, fiscal, accounting, and other matters for CRY’s grantees to follow and to report back on to CRY. This is a form of domestic, intermediary donor-enforced self-regulation, imposed on a defined grantee group, backed by a key incentive (no compliance, no funding) that strengthens the authority of the intermediary body (here, CRY) vis-à-vis both its own donors and its grant recipients.⁴¹ It is a system intended to give donors more confidence, to build capacity and accountability within a defined number of smaller nonprofit organizations, and to strengthen the institutional role of an important charitable intermediary. It can also have substantial negative implications as well—giving donors considerable power over their recipients and forcing recipients to bow to donors’ notions of accountability and accomplishment.⁴²

A second example of such “intranet self-regulation” is the Give Foundation’s project to promote giving by India’s new middle class and wealthy, fundraising by nonprofits, and nonprofit transparency and accountability so that India’s new donors have some confidence in charitable recipients. The Give Foundation is another intermediary donor—taking in funds from individuals and corporate entities in India and beyond and regranting funds to NGOs around India in a sort of donor-advised fund capacity. Give’s initiative includes careful selection of recipient organizations involving mandatory criteria that emphasize accountability and transparency, and encouragement of giving to those selected organizations. Give

41. I am grateful to Sanjay Agarwal and Mamta Saikia for extensive discussions of this initiative. CRY’s homepage is at <http://www.cry.org> (last visited Mar. 7, 2005). What I call the CRY “intranet self-regulation” initiative was substantially assisted by the Delhi-based nonprofit accounting organization Accountaid. See Accountaid, *Accountaid on NGO Accounting & Regulation*, at <http://www.accountaid.net> (last visited Mar. 7, 2005).

42. My thanks to Harvey Dale for raising this point forcefully at the Chicago-Kent Law Review symposium.

also offers financial, accounting, and management assistance to the selected nonprofits.⁴³

This is “intranet” self-regulation as a market-limiting device, backed up by the availability of charitable donations to organizations that meet Give’s tests. It is intended to give donors at least some assurances of transparency and accountability, and to strengthen the intermediary’s approaches to its donors by imposing a form of incentivized self-regulation on its recipients.⁴⁴ Finally, as noted above, it can promote accountability but also give substantial—perhaps too much—power to the donors as well.

E. *The Return to Sectoral Norms and New Problems*

In 2001 and 2002, several of these trends converged. VANI’s guiding principles had been discussed in the sector for several years. CAF’s database and validation project with the Planning Commission was coming to a conclusion. The Childline India Foundation, with support from Price Waterhouse Coopers, conducted a “Study Concerning a National Accreditation Body or Performance Rating Body for NGOs and the Identification of a Possible Framework for a Future Rating.”⁴⁵ The nonprofit sector was once again gearing up for Parliamentary moves to expand government regulation of nonprofits.

From those strands came a decision to define norms that organizations should meet and to develop a set of those minimum norms for certification in the voluntary sector. In turn, this decision resulted in the formation of the Credibility Alliance, a grouping of a number of key nonprofits concerned with governance, accountability, and transparency in the Indian nonprofit sector.⁴⁶

The Minimum Norms for Enhancing Credibility of the Voluntary Sector defined through exhaustive discussion by the Credibility Alliance in 2001 and 2002 covered existence and registration, objectives and performance, governance, program management and human resources, accountability, and transparency,⁴⁷ “emphasi[zing] disclosure, in keeping with the principles of transparency and accountability rather than . . . value judg-

43. Aarti Madhusudan et al., *India: The Role/Influence of the Sector in the Country*, in GOVERNANCE, ORGANIZATIONAL EFFECTIVENESS AND THE NONPROFIT SECTOR, *supra* note 24, at 110, 121–22, available at <http://www.asianphilanthropy.org/staging/about/INDIA1.pdf>.

44. *Id.*

45. CREDIBILITY ALLIANCE, *supra* note 36.

46. See Madhusudan, *supra* note 43, at 121.

47. The Finalised Minimum Norms for Enhancing Credibility of the Voluntary Sector are available at Credibility Alliance, *Latest Draft Norms*, at <http://www.credibilityalliance.org/information/Latestdraftnorms> (last modified Feb. 21, 2004).

ment.”⁴⁸ Five thousand copies of the norms each in English and Hindi were distributed to voluntary organizations around India; Tamil and Marathi versions were printed as well, and translations were initiated in eleven other vernacular languages.⁴⁹ Compliance with the minimum norms was voluntary, and any accreditation, evaluation, or ratings against those norms was assumed to be the role of separate agencies, not the Alliance itself.⁵⁰

Like other codes and best practices, these are valuable activities for strengthening standards in the sector. But by 2003 and 2004, activity seemed to be slowing. There was continuing discussion underway on a range of issues, including the structure and form of an accreditation process or some other mechanism for evaluating compliance with the Alliance’s minimum norms. The Credibility Alliance faced an uncertain future with a number of possible roads ahead: it might “continu[e] the consensus building process,” “institutionaliz[e] the Credibility Alliance [s]tructure,” or some combination of the two.⁵¹ There was continuing discussion on the suitable role for the Alliance: Should it continue to focus on building a consensus for self-regulation, accountability and transparency and on the development of the minimum norms? Should it play a role in evaluating compliance with those norms, moving toward an evaluative or even an enforcement role?

These questions remained under discussion at mid-2003 and into 2004.⁵² But the fundamental result seemed not dissimilar to that experienced by VANI when it sought to promote a “code of conduct” in the early 1990s: It is notoriously difficult to develop substantial, detailed, explicit adherence to nonprofit norms and codes, particularly where there is no incentive mechanism to back them up. The Credibility Alliance had no

48. Credibility Alliance, *Frequently Asked Questions*, at <http://credibilityalliance.org/information/FAQ> (last modified Feb. 21, 2004).

49. Credibility Alliance, *Progress Report (October 2002–15 March 2003)*, at http://credibilityalliance.org/regional_meetings/rw_15042003_prog_report.pdf.

50. In 2002 and 2003 the Credibility Alliance held discussion meetings in Bangalore, Mumbai, Delhi, and other major cities to discuss the proposed minimum norms and a range of self-regulation issues. The Alliance also discussed and developed “suggested best practices” in nonprofit accounting procedures (expanding on earlier work done by Accountaid and others), annual reports (based on work developed by Murray Culshaw Advisory Services), and human resource policies. See Presentation on Accounting Procedures; Presentation on Suggested Practices on Human Resource Policies and Procedures; Presentation on Suggested Practices for Annual Reports, available at http://www.credibilityalliance.org/information/FAQ/Meetings/core_meeting (last visited Mar. 7, 2005).

51. See Credibility Alliance, *The Way Ahead*, available at http://www.credibility-alliance.org/core_group/rw_the_way_ahead.pdf (last visited Mar. 7, 2005).

52. See *id.* By 2003 donor support for the work of the Alliance had expanded from the British High Commission to including US AID as well as a grant from the Ford Foundation, pending grant clearance from the Government of India. Thirty zonal workshops, four regional workshops, and a national workshop were planned for the spring and summer of 2003.

government funds to hold back or distribute; it played no role in determining government approvals of nonprofit formation, or nonprofit tax exemptions; it had no disciplinary process—in short, it had no incentives to back up the norms and give them force. It was an alliance rather than an aggressive entrepreneurial actor, and it did not seek alliance with or any form of capital—financial or political—from government. Its code-setting activities may have helped to propagate ideas about good practices in the nonprofit sector, but adherence to and enforcement of the norms seem far off.

IV. PHILIPPINES

A. *The Emergence of Nonprofit Self-Regulation*

Concern with self-regulation in the Philippines seems to begin with the inauguration of the Corazon Aquino government in 1986, leading to what may well be Asia's first major code of conduct for nonprofit organizations in 1991.⁵³ The Aquino government developed a considerably closer relationship with the Philippine nonprofit sector than its predecessors had, for civil society organizations played an important role in the resistance to the Marcos regime. Nonprofit leaders also joined the Aquino administration in senior positions. Associational activity grew rapidly, and with it concerns for accountability.

B. *The Strengths and Weaknesses of Codes*

The first self-regulatory responses to those accountability concerns were traditional, and they have had mixed success. The Philippines' Caucus of Development NGO Networks ("CODE-NGO") adopted the Code of Conduct for Development NGOs in 1991, which was notable for being "possibly among the first attempts by an NGO community to establish provisions for self-regulation" anywhere in Asia.⁵⁴ That is correct—certainly there appears to be no earlier code of conduct developed by and for the nonprofit community in any country of Asia surveyed. The Code provides principles for accountability, transparency, and other key areas of nonprofit operations. As is often the case with such codes, it helped to

53. The Philippine experience with nonprofit self-regulation is superbly surveyed and discussed in Carmencita T. Abella and Ma. Amor L. Dimalanta's excellent country paper for the APPC Manila conference. See Carmencita T. Abella & Ma. Amor L. Dimalanta, *Philippines: NGOs as Major Actors in Philippine Society*, in GOVERNANCE, ORGANIZATIONAL EFFECTIVENESS AND THE NONPROFIT SECTOR, *supra* note 24, at 232, available at <http://www.asianphilanthropy.org/staging/about/PHILIPPINES1.pdf>.

54. *Id.* at 248.

promote new ideas about nonprofit quality and accountability but languished as a regulatory and disciplinary mechanism.

CODE-NGO is currently working on a revision of the Code and on sanctions and implementation policies. Notably, CODE-NGO seems to be tying future use of the Code to stronger incentives and to a process that includes government. It has encouraged its members to seek certification from one of the newer and more aggressive self-regulatory associational entrepreneurs “as one concrete and positive way of complying with the Code of Conduct,”⁵⁵ and Philippine colleagues report that much of the planned implementation of the Code will be in conjunction with the incentive-based system, discussed below—a recognition that code-based self-regulatory systems may well need stronger incentives to be sustainable over a long term.

C. The Second Wave: Incentive-Based Associational Entrepreneurism, Alliance with Government, and the Emergence of the Philippine Council for Nonprofit Certification

When proposals were made in the early 1990s to narrow tax exemptions available to some nonprofits, the government suggested a nonprofit certification mechanism for certain nonprofits.⁵⁶ That process has resulted in the formation of an important new associational entrepreneur that emerged solely to carry out nonprofit self-regulation—the Philippine Council for Nonprofit Certification (“PCNC”). It has also spawned an alliance with government that has both benefited the nonprofit sector and strengthened the allying associational entrepreneur, as well as direct government support for a self-regulatory initiative. Underlying all of these developments is the crucial link between nonprofit self-regulation, incentives, and the government; the Philippine government has conditioned nonprofit tax exemption on compliance with heightened self-regulation standards, forcing the sector to reach for higher standards, making a range of nonprofits comply with the new associational entrepreneur’s rules, and in turn strengthening norms and standards in the nonprofit sector (as well as the associational entrepreneur itself).⁵⁷

55. *Id.* at 250. The Code is available at CODE-NGO, THE CODE-NGO REVISED COVENANT ON PHILIPPINE DEVELOPMENT (July 2001), available at <http://www.codengo.org/docs/Revised-Covenant.DOC>.

56. PCNC notes this history in considerably more detail, at Philippine Council for NGO Certification, *PCNC: Background and Rationale*, at <http://www.pcnc.com.ph/background-and-rationale.html> (last visited Mar. 7, 2005).

57. Abella & Dimalanta, *supra* note 53, at 251.

Thus the nonprofit sector itself in the Philippines is now taking charge of the certification process by which organizations achieve and maintain their tax-exempt status, giving individual and corporate donors a tax deduction on contributions to certified organizations. This certification process forms one core for nonprofit self-regulation in the Philippines and has become an initiative discussed throughout Asia.⁵⁸ But it is not the only nonprofit self-regulation initiative in the Philippines, and several others are mentioned below.⁵⁹

The certification process that resulted in the formation and operations of the PCNC was originally developed as a three-year pilot program with the Ministry of Finance and is now continuing. About 1,000 organizations have applied for certification, and about 300 organizations have been certified so far, with more in the pipeline.⁶⁰

The Philippines certification process presents a different kind of self-regulation model than many of the others around the region. It arises out of an agreement with government for the nonprofit sector to play a significant role in a traditional government responsibility—the granting of tax exemption—and it operates with official government support. It is a self-regulation process rooted in taxation that operates in close cooperation with government, a mechanism virtually unique in the region. But its importance lies beyond that, for the process now coordinated by PCNC and several other groups is “not only [intended] to pursue tax incentives for donors to NGOs but also, and even more importantly, to promote professionalism, accountability, and transparency among [NGO network] members, and the Philippine non-profit sector.”⁶¹

It has also been a slow process, requiring a lengthy and labor-intensive consideration process, and it is not yet clear if it is effectively expandable to cover a large number of nonprofits in the Philippines. Nor is that necessarily its goal, and the number of organizations seeking certification may be reduced because the incentive may not be strong enough—some organizations do not perceive the need for tax exemption.⁶²

Despite these caveats, a new model is clearly at work in the Philippine context. Its features include an aggressive associational entrepreneur for

58. I am indebted to several friends and colleagues in the Philippines for discussions of the PCNC process, among them Rory Tolentino, Fely Soledad, Marianne Quebral, Eugene Caccam, Jaime Faustino, and others. See the PCNC website, *supra* note 56, for further information on the background and activities of the Council and Abella & Dimalanta’s very useful review, *supra* note 53, at 251–53.

59. For further details, see Abella & Dimalanta, *supra* note 53, at 248–55.

60. *Id.* at 252.

61. Philippine Council for NGO Certification, *supra* note 56.

62. See Abella & Dimantala, *supra* note 53, at 253.

which self-regulation is a road to a market and the core of its work in reaching that market; an incentive-based alliance with government that both promotes the associational entrepreneur and the importance of self-regulation within the sector; self-regulation to limit the nonprofit market rather than to reach all organizations; and the crucial presence of a strong reason—tax exemption—for at least some organizations to comply with a self-regulation process.

D. The Second Wave: Other Philippine Initiatives in Self-Regulation

Several “intranet” self-regulatory mechanisms indicate that, as noted for the CRY experience in India, a combination of incentives (usually the danger of losing funds from a larger donative nonprofit) and a relatively narrow range of regulated nonprofits can result in effective self-regulation activity.

In the late 1990s, for example, the Caucus of Development NGO Networks developed a disclosure and sanction process (called a “whitelist”) to identify noncomplying grant recipients of the Philippines-Canada Human Resource Development Program, encourage them to comply with reporting and financial requirements, and publicize those that did not. Eventually sixty organizations were publicized, and several were removed from NGO networks. As Abella and Dimalanta note, “a large segment of the NGO community was . . . able to demonstrate its ability to exact from its member organizations greater responsibility and accountability for their performance”⁶³ through a system based upon sanctions—loss of grant resources—and publicity within key community networks.

A second example of “intranet” self-regulation emphasizing organizational standards and self-assessment was developed by the Children and Youth Foundation of the Philippines for the nonprofits to which it provides funds. This particular process relies on self-assessment by the grantee organization and validation by the Foundation, with Foundation assistance also provided in specific areas in which weaknesses are identified.⁶⁴

63. *Id.* at 250.

64. *Id.* at 255. Other self-regulatory initiatives are also underway in the Philippines. Several nonprofit networks, including the Partnership for Philippine Service Agencies (“PHILSSA”) and the Association of Foundations, have implemented ratings systems that provide information on their members. Philippine Business for Social Progress (“PBSP”) is conducting external evaluations and peer review of its members covering operations, program, and organizational effectiveness. Other self-regulatory initiatives underway include a project in information disclosure called the NGO Mega Data-bank Project, sponsored by the Philippine Association of Foundations, that seeks to provide additional information on the Association of Foundation’s members and to strengthen their cooperation with each other and with donors. *Id.* at 254–55.

V. THE NEW WAVE OF AMERICAN NONPROFIT SELF-REGULATION

The first wave of American nonprofit self-regulatory efforts dates back at least to the 1970s. These important developments have been discussed in detail by Bies, Bothwell, Brody, Chisolm, Edwards and Hulme, Hammack, Light, and others.⁶⁵ That wave of self-regulation set in place a structure in which some charitable industries self-regulate using extensive, incentive-based accreditation, licensing, or other models coordinated by powerful and well-funded regulatory organizations—we might term these the “original” associational entrepreneurs in the self-regulation field. Other parts of the charitable sector employ codes or best practices that help to promote and raise standards in the sector but that are also difficult to enforce and usually carry few incentives for compliance.

The corporate scandals of the last several years—Enron, Worldcom, and others—and the continuing problems of nonprofit accountability have now led to renewed attempts to make nonprofits more accountable.⁶⁶ Disclosure requirements are being strengthened, and Congress, the Internal Revenue Service, and the states have proposed additional tightening of federal and state nonprofit regulation. The nonprofit community has responded as well, through a variety of new self-regulation proposals and initiatives intended to strengthen disclosure, enhance the credibility of the nonprofit sector, and forestall stricter federal and state regulation. There are perhaps three significant newer strands to recent nonprofit self-regulation efforts, some of which resulted from earlier efforts at self-regulation:

A. *Strong, Incentive-Based Accreditation and Enforcement Organizations*

A number of strong, accreditation-based, high enforcement, incentive-based, funding-related self-regulation efforts continue to focus on tightly

65. *See supra* note 21.

66. Robert Bothwell sets out the background in depressing detail. The 1990s, he wrote, were: a great trial for U.S. charities: the conviction of Jim and Tammy Faye Bakker for illegal activities connected with their televangelism; the forced resignation of the founder of Covenant House for improper advances to boys; the conviction of Bill Aramony, CEO of the United Way of America, for misuse of funds; the conviction of the founder/CEO of the Foundation for New Era Philanthropy for a pyramid scam; the forced resignation of the President of Adelphi University for lavish spending; the forced resignation of the trustees of the Hawaiian Bishop Estate for paying themselves \$1 million each in trustee fees and other improper financial behavior; the forced resignation of the President of Feed the Children in Oklahoma for misuse of funds; the expose of fraudulent advertising by child sponsorship charities; the frequent reports of expired, inappropriate and sometimes perverse donated corporate products—the list goes on and on when recounting the charity scandals exposed by the media in the past decade.

Bothwell, *supra* note 21.

bordered subsets of the nonprofit and charitable community. These self-regulatory mechanisms generally involve five key elements: mandatory accreditation or certification efforts; a well-defined subset of the nonprofit (or social service) community; a direct incentive-based relationship between such accreditation or certification and government or other funding decisions (or the ability to bring in income, such as tuition); external enforcement mechanisms that are not solely dependent on self-enforcement by the organizations themselves; and strong ongoing learning and resource processes. In most cases these strong, accreditation-based, high enforcement, self-regulatory efforts are mandated by funding requirements.

Examples of this strong form of self-regulation bolstered by funding requirements are the Joint Commission on Accreditation of Healthcare Organizations (“JHACO”), the accrediting body relied upon by the federal government’s Joint Commission and the Centers for Medicare and Medicaid Services (“CMS”) in determining federal transfers of funds to the hospital sector,⁶⁷ and the multiple accrediting bodies that serve and exercise control within American higher education.⁶⁸ This typology is consistent with research findings within and outside the nonprofit sector, involving compliance with norms and self-regulation in other fields (such as the Internet) and in theoretical models.⁶⁹

67. For further information on JHACO, see Joint Commission on Accreditation of Healthcare Organizations, at <http://www.jcaho.org/> (last visited Mar. 7, 2005).

68. These include, for example, the American Assembly of Collegiate Schools of Business (for business schools); the Commission on Dental Accreditation (dental schools); the American Bar Association and the Association of American Law Schools (law schools); the Liaison Committee on Medical Education, representing the American Medical Association and the Association of American Medical Colleges (medical schools); National League for Nursing and state boards of nursing (nursing schools); American Council on Pharmaceutical Education (pharmacy schools); Accrediting Council on Education in Journalism & Mass Communication (journalism schools); American Library Association (library schools); Engineering Accreditation Commission of the Accreditation Board for Engineering and Technology (engineering schools); American Psychology Association (psychology schools); and a host of similar institutions.

69. See, e.g., AMITAI AVIRAM, THE PARADOX OF SPONTANEOUS FORMATION OF PRIVATE LEGAL SYSTEMS (Univ. of Chi. Law Sch., John M. Olin Law & Econ. Working Paper No. 192, July 2003), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=421500; AMITAI AVIRAM, NETWORK RESPONSES TO NETWORK THREATS: THE EVOLUTION INTO PRIVATE CYBER-SECURITY ASSOCIATIONS (Fla. State Univ. Coll. of Law Working Paper No. 115, July 2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=570342; Bies, *supra* note 21; Alnoor Ebrahim, *Accountability in Practice: Mechanisms for NGOs*, 31 WORLD DEV. 813 (2003); Andrew A. King & Michael J. Lenox, *Industry Self-Regulation Without Sanctions: The Chemical Industry’s Responsible Care Program*, 43 ACAD. MGMT. J. 698 (2000); John W. Maxwell et al., *Self-Regulation and Social Welfare: The Political Economy of Corporate Environmentalism*, 43 J.L. & ECON. 583 (2000).

*B. Diverse and Generally Weaker Traditional,
Code-Based Self-Regulatory Efforts*

A second group of self-regulatory efforts serve important parts of the American nonprofit sector, such as grantmaking foundations or large, national nonprofits. These are, for the most part, efforts to promote good practices rather than enforceable mandates, and they are useful in that role, though they rarely carry the weight of funding or regulatory incentives for implementation, and they rarely involve alliance with government.

Examples of these efforts include the best practices codes of Independent Sector,⁷⁰ the National Council of Nonprofit Associations,⁷¹ the Council on Foundations,⁷² the Charities Review Council of Minnesota,⁷³ the Minnesota Council on Foundations,⁷⁴ the Council of Michigan Foundations,⁷⁵ associational efforts to rate and evaluate public charities,⁷⁶ self-regulation efforts in the fundraising industry,⁷⁷ and other groups.

70. See INDEP. SECTOR, STATEMENT OF VALUES AND CODE OF ETHICS FOR NONPROFIT AND PHILANTHROPIC ORGANIZATIONS (Feb. 3, 2004), available at http://www.independent-sector.org/PDFs/code_ethics.pdf and the earlier (though now largely forgotten) INDEP. SECTOR, OBEDIENCE TO THE UNENFORCEABLE: ETHICS AND THE NATION'S VOLUNTARY AND PHILANTHROPIC COMMUNITY (2002), available at <http://www.independentsector.org/PDFs/obedience.pdf>.

71. See NAT'L COUNCIL OF NONPROFIT ASS'NS, NCNA CODE OF ETHICS FOR MEMBERS (1995), available at <http://www.ncna.org/index.cfm?fuseaction=Page.viewPage&pageID=441>.

72. The Council on Foundations' numerous activities in this area include: RECOMMENDED PRINCIPLES AND PRACTICES FOR EFFECTIVE GRANTMAKING (June 25, 2002), available at <http://www.cof.org/Content/General/Display.cfm?contentID=156&menuContainerName=&navID=0>; NATIONAL STANDARDS FOR U.S. COMMUNITY FOUNDATIONS (Mar. 24, 2004), available at http://www.cof.org/files/Documents/Community_Foundations/National_Standards/CFStandards061004.doc; STEWARDSHIP PRINCIPLES FOR FAMILY FOUNDATIONS (Sept. 2004), available at <http://www.cof.org/Content/General/Display.cfm?contentID=2045>; STEWARDSHIP PRINCIPLES FOR CORPORATE GRANTMAKERS (Sept. 2004), available at http://www.cof.org/files/Documents/Corporate_Grantmaking/Corporate%20Principles/Principles_Booklet_Corporate_FINAL.pdf; PROPOSED GOVERNANCE PRINCIPLES FOR DISCUSSION WITH LARGE FOUNDATIONS, available at <http://www.cof.org/Content/General/Display.cfm?contentID=1753> (last visited Mar. 7, 2005).

73. See CHARITIES REVIEW COUNCIL OF MINN., CHARITIES REVIEW COUNCIL STANDARDS (Jan. 8, 1998), available at <http://www.crcmn.org/standards/standards.pdf>.

74. See MINN. COUNCIL ON FOUNDS., PRINCIPLES FOR MINNESOTA GRANTMAKERS (June 11, 1996), available at <http://www.mcf.org/mcf/about/principle.htm>.

75. See COUNCIL OF MICH. FOUNDS., MINIMUM STANDARDS FOR MICHIGAN COMMUNITY FOUNDATIONS, available at <http://www.forgoodforever.org/index.cfm/fuseaction/view.i/itemID/440> (last visited Mar. 7, 2005).

76. See, for example, the rating processes in American Institute of Philanthropy, *Criteria*, at <http://www.charitywatch.org/criteria.html> (last updated Nov. 1, 2004); BBB WISE GIVING ALLIANCE, STANDARDS FOR CHARITABLE ACCOUNTABILITY (2003), available at <http://www.give.org/standards/spring03standards.PDF>; Charity Navigator, *Methodology: How Do We Rate Charities?*, at <http://www.charitynavigator.org/index.cfm/bay/content.view/catid/2/cpid/35.htm> (last visited Mar. 7, 2005); Ministry Watch, *The MinistryWatch.com 5 Star Ratings System*, at <http://www.ministrywatch.org/mw2.1/pdf/mw5star1.pdf> (last visited Mar. 7, 2005); Ministry Watch, *The MinistryWatch.com Transparency Grade*, at <http://www.ministrywatch.org/mw2.1/pdf/tg3.pdf> (last visited Mar. 7, 2005).

Some of these—such as the fundraising codes—may include some attempts at enforcement or ratings that the broader nonprofit and philanthropic codes rarely include. But these efforts are rarely backed by either incentives for performance or alliance with government, making them useful for strengthening standards and norms but difficult to enforce against violators—including the violators that make the newspapers and embroil and sully the sector.⁷⁸

Yet it is also unfair to lump all these code-based regimes together. Some inspire more obedience than others: In general terms, the codes discussed and drafted in a participatory manner at the state level are sensitive to local conditions (as in Minnesota or perhaps in Maryland, discussed below) and seem to attract more attention and respect at the state level than the broad national standards. The efforts of some of the public charity watchdog organizations at times seem similar to the kind of associational entrepreneurship that we noted in India and Philippines—but their effectiveness and strength is limited by the lack of incentives built into the process, and the inability to ally with government to promote enforcement.

In all cases, it is important to note that even the general codes play the important role of identifying areas of accountability and best practice and urging nonprofits to a higher standard of performance. That encouragement of higher and better standards is an aspect of the new nonprofit self-regulation should not be ignored. Nor should the political impact of even weak codes be ignored: The discussion and promotion of codes plays a major role in forestalling stricter government regulation of the nonprofit sector at both federal and state levels.

In addition, there are codes or best practices for parts of the American nonprofit sector that may not carry direct incentives for enforcement, nor involve alliance with government, but carry very significant weight nonetheless. It may be that these occur primarily within tight-knit sectors in which the reputational effects of violation of norms are important negative incentives even without financial or regulatory incentives. Within the museum field, for example, the Code of Ethics of the American Association of Museums carries substantial weight despite the lack of direct financial or regulatory incentives for compliance or a relationship with government and its available sanctions.⁷⁹

77. See, for example, the Association of Fundraising Professionals' standards for voluntary organizations. Association of Fundraising Professionals, *The Accountable Nonprofit Organization*, at http://www.afpnet.org/tier3_cd.cfm?folder_id=897&content_item_id=1072 (last visited Mar. 7, 2005).

78. For a very useful discussion of this problem in the Minnesota context, see Bies, *supra* note 21.

79. See American Association of Museums, *Code of Ethics for Museums*, at <http://www.aamus.org/museumresources/ethics/coe.cfm> (last visited Mar. 7, 2005).

C. *The Emergence of the New Self-Regulatory Associational Entrepreneurs*

A third feature of the new self-regulatory environment is the emergence of associational entrepreneurs in the United States that understand the social need and market for nonprofit accountability. They attempt to satisfy that market, and benefit society, through self-regulation initiatives, training, and other contributions to nonprofit accountability. These are not our parents' trade associations like Independent Sector and the Council on Foundations sires to broad, useful, but hard-to-enforce codes that often seem stepchildren of the "real" lobbying underway.

Instead, the new associational entrepreneurs are engaged in serious attempts to build self-regulation as a primary goal of their organizations. At the same time, they are hampered because those efforts generally do not include funding or regulatory incentives for compliance, nor do they involve direct alliance with government. But even these features are beginning to change. Government is beginning to look toward the new associational entrepreneurs as avenues for stronger self-regulation. Government also is initiating a discussion of providing funding for the spread of serious self-regulation and funding or regulatory incentives for self-regulatory compliance.

D. *An Example of Self-Regulatory Associational Entrepreneurship: The Maryland Standards and the Standards of Excellence Institute*

One example of an American associational entrepreneur in this arena is the Maryland Council of Nonprofit Associations. The Maryland association developed the *Standards of Excellence: An Ethics and Accountability Code for the Nonprofit Sector*, a series of self-regulatory standards for Maryland nonprofits that emphasizes a certification regime.⁸⁰ Thereafter followed several years of promotion of that self-regulatory mechanism in Maryland, along with extensive education and training efforts, resulting in the certification of forty-four organizations (of several thousand nonprofits operating in Maryland).⁸¹

80. MD. ASS'N OF NONPROFIT ORGS., STANDARDS FOR EXCELLENCE: AN ETHICS AND ACCOUNTABILITY CODE FOR THE NONPROFIT SECTOR (2004), available at http://www.marylandnonprofits.org/html/standards/04_02.asp.

81. Maryland Association of Nonprofit Organizations, *Membership Directory*, at http://eseries.mdnonprofit.org/scriptcontent/index_member_search.cfm?section=Standards&member_type=CERTIFIEDNONPROFIT&City=&county=Statewide&State=A&Keyword=&zip=&company=&taxonomy=Search+All&x=34&y=10=#SearchResults (last visited Mar. 7, 2005).

After several years of promotion of that mechanism in Maryland, the Maryland association obtained foundation funding from the Rockefeller Brothers Fund, Surdna Foundation, Carnegie Corporation of New York, and Atlantic Philanthropies for its expansion into five other states: Louisiana, North Carolina, Ohio, Pennsylvania, and Georgia,⁸² and opened a website devoted to expansion activities.⁸³ Versions of the Maryland Standards were rolled out in Louisiana,⁸⁴ North Carolina,⁸⁵ Ohio,⁸⁶ Pennsylvania,⁸⁷ and Georgia⁸⁸ in 2001 and 2002 for promotion and implementation. Those states have been joined by rollouts of versions of the Maryland Standards in Utah and other states⁸⁹ and accelerating discussions of nonprofit standards in Iowa and elsewhere.⁹⁰

What is now the Standards for Excellence Institute seeks national expansion of the self-regulatory Standards. Its embrace of a fairly aggressive form of self-regulatory associational entrepreneurship is clear:

We are pleased to see outstanding progress in all five replication partner states. Progress to date positions the replication partners to meet their objectives of full-scale implementation of the Standards for Excellence program. However, much more work needs to be done in order to sustain and maintain these Standards for Excellence programs at a level that will allow for the continued success of our national replication partners' efforts, as well as for preparation to work in other states. In addition, evidence indicates that the Standards for Excellence program model is an attractive one that appears to be replicable in a variety of environments. This evidence is very encouraging and holds tremendous promise for the

82. See Maryland Association of Nonprofit Organizations, *Replicating the Standards for Excellence Program*, at <http://www.marylandnonprofits.org/html/standards/index.asp#replicating> (last visited Mar. 7, 2005).

83. The website is located at <http://www.standardsforexcellenceinstitute.org> (last visited Mar. 7, 2005).

84. Louisiana Association of Nonprofit Organizations, *Standards*, at <http://www.lano.org/explore.cfm/programs/standards/> (last visited Mar. 7, 2005).

85. North Carolina Center for Nonprofits, *Standards for Excellence: A Self-Help Tool for Nonprofits' Organizational Effectiveness*, at <http://www.ncnonprofits.org/standards.html> (last updated Oct. 13, 2004).

86. OHIO ASS'N OF NONPROFIT ORGS., STANDARDS FOR EXCELLENCE: AN ETHICS AND ACCOUNTABILITY CODE FOR THE NONPROFIT SECTOR (2001), available at <http://www.oano.org/Docs/-Ohio.Standardsfinal.pdf>.

87. PA. ASS'N OF NONPROFIT ORGS., STANDARDS FOR EXCELLENCE: AN ETHICS AND ACCOUNTABILITY CODE FOR THE NONPROFIT SECTOR (2002), available at <http://www.pano.org/standards/standardscode.php>.

88. GA. INST. OF NONPROFITS, STANDARDS FOR EXCELLENCE: AN ETHICS AND ACCOUNTABILITY CODE FOR THE NONPROFIT SECTOR (2003), available at http://www.gcn.org/pdfs/georgia_standards.pdf.

89. Utah Nonprofits Association, *Standards of Ethics for Nonprofit Organizations in Utah*, at http://www.utahnonprofits.org/stds_eths.html (last visited Mar. 7, 2005).

90. See, e.g., Iowa Nonprofit Task Force, *Iowa Best Practices*, available at <http://inrc.continuetolearn.uiowa.edu/updates/Best%20PracticesB.asp> (last visited Mar. 7, 2005).

further adoption of the Standards for Excellence program across the country.

We recognize the opportunity for the Standards for Excellence to become the national standard for ethics and accountability in the nonprofit sector, setting a high bar for governance and management practices among state and local level organizations. We look forward to widening the scope and audience of the program in the months and years to come.⁹¹

This is entrepreneurship of a sort perhaps impossible in the broader trade associations, such as Independent Sector. But, as the Maryland group has recognized, entrepreneurship and replication may well be insufficient by themselves. Yet along with their efforts, federal regulators are paying increasing attention to nonprofit self-regulation as well.

The Senate Finance Committee's Staff Discussion Draft on nonprofit law reforms moves the debate further along. The Senate staff suggested that funds be provided for self-regulation efforts, endorsed the Maryland Standards approach, suggested that the IRS contract with nongovernmental self-regulatory organizations and—perhaps most dramatically—endorsed the notion that the IRS directly condition “charitable status” or “authority of a charity to accept charitable donations” on accreditation.⁹² Whether these ideas become law or not, direct incentives for self-regulation and alliance with government appear under direct discussion. The Finance Committee staff's language is worth quoting in its entirety:

There would be an authorization of \$10 million to the IRS to support accreditation of charities nationwide, in States, as well as accreditation of charities of particular classes (e.g. private foundations, land conservation groups, etc.). The IRS can initiate its own accreditation efforts as well as solicit requests. Priority would be given to proposals with matching dollars. The IRS would have the authority to contract with tax exempt organizations that would create and manage an accreditation program to establish best practices . . . and review organizations on an ongoing basis for compliance. Such organizations could require dues by members to meet costs; and contract authority to review member information and take corrective action. The IRS would have the authority to base charitable status or authority of a charity to accept charitable donations on whether an organization is accredited. The proposal should encourage accreditation that is already taking place at the state level (e.g. Maryland, Ohio, Pennsylvania, Georgia and Louisiana) or in particular classes (nonprofit hospitals, zoos and universities) already subject to accreditation.⁹³

91. See Maryland Association of Nonprofit Organizations, *supra* note 82.

92. STAFF DISCUSSION DRAFT, *supra* note 16, at 14.

93. *Id.* at 14–15 (citations omitted). For the records for the June 2004 hearing on charity oversight and reform, see *Charity Oversight and Reform Hearings*, *supra* note 7.

The Staff Discussion Draft explicitly cited the standards promulgated by and through the efforts of the Maryland Standards for Excellence Institute, and directly cites the work of that associational entrepreneur.⁹⁴ The potential for alliance goes further, whether with the Maryland group or with other self-regulatory associational entrepreneurs. The Staff Discussion Draft calls for:

[f]unding of \$25 million for nonprofit exempt organizations that educate other tax exempt organizations on best practices and inform the public of charities that are engaged in best practices; such funds would be provided to State organizations as well as national organizations to ensure an education presence in each state; a priority would be given to organizations that assist small charities in meeting proper standards and accreditation.⁹⁵

Here we have a confluence of interest that seeks to benefit multiple goals: forestalling stricter government regulation of the “good charities” by strengthening self-regulation; providing direct incentives, both fiscal and regulatory, for compliance with self-regulation; and handling these issues in partnership with a nimble associational entrepreneur that has understood the importance of the new self-regulatory movement, the importance of incentives and government in its spread, and seeks government endorsement and support for its organizational expansion.

In October 2004, Independent Sector—a national group representing nonprofits throughout the United States—convened a Panel on the Non-profit Sector at the encouragement of the Senate Finance Committee to “recommend actions to strengthen the governance, ethical conduct, and accountability of charitable organizations.”⁹⁶ The Panel and its five work groups (including a work group on “government oversight and self-regulation”) began intensive activities in the fall of 2004, holding field meetings and releasing an interim report in on March 1, 2005.⁹⁷

The Panel’s initial view of the benefits of self-regulation was clear, as well as a general endorsement of government’s role in “identifying and promoting best practices and strongly encouraging compliance”:

The vast majority of charitable organizations are committed to ethical conduct and responsible governance and are willing to conform to commonly accepted standards of practice. Such practices are an important component of the effort by the charitable sector to encourage all nonprofit organizations to embrace the highest possible standards of

94. STAFF DISCUSSION DRAFT, *supra* note 16, at 15 n.21.

95. *Id.* at 15.

96. Independent Sector, *Senate Finance Committee Invites Sector-Wide Input to Improve Governance and Practice*, at <http://www.independentsector.org/panel/main.htm> (last visited Apr. 7, 2005).

97. PANEL ON THE NONPROFIT SECTOR, *supra* note 16.

conduct. Whether it be peer review and feedback, coupled with transparency in practice or more complex systems of accreditation, such initiatives, if actively embraced by the sector, are likely to bring about positive change.

. . . [T]he charitable sector nonetheless must be actively involved in identifying and promoting best practices and strongly encouraging compliance within relevant subsectors. . . . Both the sector and government should provide the resources necessary to disseminate best practices and to develop and sustain ongoing education efforts”⁹⁸

The Panel deferred for its final report “specific recommendations . . . for accreditation and standard-setting programs for the sector, whether the IRS or other agencies should be designated to promulgate and administer standards for the sector . . . [and] what role the sector might play in the area of accreditation and standard-setting.”⁹⁹ The Panel also agreed to “examine the scope of . . . current systems to identify effective models, problems in implementation, and needs for expansion of these programs, and make recommendations regarding the Senate Finance Committee staff proposal.”¹⁰⁰

VI. CONCLUSION:

THE PROMISE AND LIMITS OF NONPROFIT SELF-REGULATION

In assessing the promise and the limitations of self-regulation, we must be cautious. To point out that most previous attempts at self-regulation, emphasizing best practices and codes, have served very generally to raise standards rather than measurably to reduce abuses is not to call for a full, incentive-based, government-allied regulatory regime dominated by associational entrepreneurs.

For that sort of regime is likely to carry significant problems as well. The long, hard process of satisfying and receiving certification from the associational entrepreneurs is likely to be exacerbated rather than eased when the federal government is funding such processes and incentivizing compliance. The cost of such processes may bar some smaller nonprofits from the certification table, thus preventing them from receiving some governmental funds under a more incentivized regime. The system put in place may unfairly benefit larger, more traditional nonprofits and discourage innovation and risk taking in governance, programs, and fundraising.

The involvement of government through alliance with self-regulatory organizations may be appropriate in certain situations (such as hospitals

98. *Id.* § 2, at 15.

99. *Id.* § IV (Accreditation and Standard Setting), at 54–55.

100. *Id.* § IV, at 55.

and their fiscal arrangements), but may bring government too close for comfort to nonprofit management in a nation where nonprofit autonomy and relative freedom from government control has always been deeply prized. As recent events in Maryland have shown, even charities certified under the increasingly vaunted (and funded) Maryland program are not immune from abuses.¹⁰¹ We must ensure that stricter self-regulation does not narrow nonprofit autonomy and freedom, and we must be cautious that self-regulation supported and incentivized by government does not become, in effect, a form of government “nationalization” of nonprofit governance and management through an ostensible “self-regulatory” process.¹⁰²

So in the end we return to a splendid diversity of approaches to nonprofit self-regulation. It would be unfortunate if self-regulation moves quickly and substantially to an accreditation or certification regime—with government funding, incentives, and at least some control—in which nonprofits’ energies are diluted from their crucially important social roles or some charities are pushed out of the picture due to their size, a strong sense of autonomy, or their innovative spirit.

In the end, the crisis of nonprofit accountability may need to be more firmly called a crisis for a few “bad charities,” a predicament that affects the broader sector and leads to now-specific calls for extensive new federal regulation. The response to the fact that most nonprofits do not violate the law or engage in unethical activities may well be to believe that best practices or “weak codes” may in fact be all that is needed to keep most nonprofits on a straight and narrow path, along with a stronger backbone on the part of key nonprofit and philanthropic umbrella organizations to criticize clearly inappropriate activities of their peers, and perhaps a stricter set of rules reserved for those organizations receiving substantial government funding or those engaged in clearly quantifiable and rankable activities. In seeking to forestall or ameliorate government’s occasionally strong impulses toward stricter regulatory plans, we must take care that the harder forms of self-regulatory solutions do not do nearly as much damage as well.

101. See Kate Shatzkin, *HERO Director Denies Allegations of Misusing Funds: Nonprofit AIDS Group Exonerates Ortega as State Group Starts Probe*, BALT. SUN, Mar. 25, 2004, at 2B; Kate Shatzkin & Lynn Anderson, *FBI Is Asked to Investigate AIDS Nonprofit: Organization’s Director Accused of Misusing Funds*, BALT. SUN, Mar. 26, 2004, at 1B; Julie Bell, *Problems Mount for AIDS Agency; Crisis: Fund Raising Suffers Amid Staff Upheaval and a Federal Probe at HERO*, BALT. SUN, May 22, 2004, at 1B.

102. For a discussion of “nationalization” in the direct regulatory context, see *Charity Oversight and Reform Hearings*, *supra* note 7, at 46–48 (statement of Willard Boyd).