



Best Practice for Fundraising Contracts Code of Fundraising Practice



2005

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1.0 The Codes of Fundraising Practice Explained

The Institute of Fundraising's **Codes of Fundraising Practice** are structured in order to highlight what is mandatory at law, what the Institute regards as a mandatory requirement for its members and what constitutes advice on best practice.

In this Code a phrase where the word:

MUST is in bold indicates a requirement that is mandatory at law.

OUGHT in bold indicates a requirement that is mandatory for members and affiliated organisations of the Institute.

SHOULD in bold indicates a course of action that is recommended as best practice.

Organisations engaged in fundraising **SHOULD** join the Fundraising Standards Board and **SHOULD** follow their complaints procedure.

This **Code of Fundraising Practice** is intended to address fundraising

activity throughout the UK. Legal requirements can vary between different jurisdictions (England & Wales; Northern Ireland; Scotland).

In this Code, **MUST*** in bold indicates a legal requirement within one jurisdiction but not in others.

The Institute recommends that organisations adhere to the most rigorous interpretation of the law applicable to an activity.

Users should be aware that this Code addresses the law as it stands at the date of publication throughout the UK.

Reviews of the law relating to fundraising and fundraising activities, governance and charitable status are ongoing in Scotland, England and Wales.

This **Code** will be revised to take into account any developments or changes in the law that may result from these initiatives

2.0 Introduction

This Code focuses primarily on Fundraising Contracts as practical documents establishing and providing for the development of core working relationships between Voluntary and Community Organisations (“Clients”) and providers of fundraising services for payment (“Providers”). To highlight the relevant issues it divides the process of creating a Fundraising Contract into stages and emphasises the need for ongoing contract management.

Fundraising services may be provided by large or small Providers and may include managing or assisting with:

- marketing and advertising campaigns;
 - direct marketing services;
 - fundraising strategies, policies and organisational capacity; and
 - particular appeals, campaigns, projects, events, giving programmes and collections.
- Overall the contract **SHOULD** precisely and comprehensively state the agreed commercial terms in simple language, ensuring regulatory compliance.
 - Both parties **SHOULD** ensure they understand and agree all provisions before signing and **SHOULD NOT** commence contractual operations until the contract is in place.

General regulatory matters are covered in the Code, but it does not extend to regulatory or practical issues which arise in relation to particular types of Fundraising Contract.

Regulation differs between the three UK jurisdictions and can vary depending on the precise nature of the activity and contract. An “*” in the text indicates a legal requirement in one jurisdiction. For those for whom it is not a legal requirement, it should be applied as best practice.

An important general distinction is between two types of Provider:

- “Professional Fundraisers”, who/which through a fund-raising business or otherwise for reward raise funds on behalf of Clients and are specifically regulated (see Section 5 for legal definitions); and
- “Consultants”, who/which advise, or provide management services, to facilitate a Client’s own fundraising activity and are not specifically regulated.

Providers and Clients **MUST*** identify any situation where “Professional Fundraiser” regulations apply (see Section 5). (Note a Provider may provide both Professional Fundraiser and Consultant services).

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The Code may be read alongside the Model Fundraising Contract in the Appendix. The Model provides a standard base and framework for Fundraising Contracts, to be adapted to particular circumstances, or to be used as a checklist.

The Code and the Model Fundraising Contract are both drafted with the intention of balancing the interests of Clients and Providers. It may be helpful for one party to a Fundraising Contract to draw the Code to the attention of the other.

The Code may be applied to Fundraising Contracts between trading subsidiaries of Clients, but it does not deal with the Client/subsidiary relationship.

The Code does not extend to contracts between Providers and their sub-contractors, or to Commercial Participator Agreements (see the Institute of Fundraising Code “Charities Working with Business”).

The Code and Model do not constitute legal advice.

3.0 Preparation and Procedures

3.1 Initially be aware of common pitfalls for clients.

3.1.1 Fundraising **SHOULD** be an integrated part of business strategy, not the strategy itself

- Clients **SHOULD** be clear about how the appointment of a Provider relates to their overall strategy and organisation. This will enable the Client to provide the information and support a Provider needs. (Some Providers are also able to assist with strategic and organisational development.)

3.1.2 Engaging a Provider is not a quick fix

- It **SHOULD** be a fully analysed decision in every case, especially when need is most critical.

An ill-considered or hurried decision is unlikely to produce real benefit. Successful fundraising is based on understanding and dialogue between Provider and Client and mutual planning within the capacities of each and the limitations of the fundraising environment.

3.2 Similarly, be aware of common pitfalls for Providers

3.2.1 It is easy to allow unrealistic expectations

- Providers **SHOULD** work within their areas of expertise and capacity, and avoid conflicts of interest.
- A Provider **OUGHT** to be realistic from the outset about what may be

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achieved within the designated time and budget. This may mean being clear about areas in which the Provider can help and those that need the Client's further attention before progress can be made.

3.2.2 There is no substitute for knowing your Client

- To be able to work well with a Client, a Provider **SHOULD** know and understand the Client's nature, needs, operations and state of development.

3.3 The Client's brief

- A Client **SHOULD** prepare a written brief of the Provider services it requires (with consultancy help if required), covering:
 - the need and how meeting it will promote the Client's public benefit objects;
 - the fundraising opportunity, activities which may realise it and how they will meet the need - this may involve the development and application of a fundraising strategy, or a particular funding requirement; it may be linked to other aims, such as public relations or profile raising; it may require investment; and may identify immediate or long-term realisation;
 - the type of Provider required - Professional Fundraiser/ Consultant/ both; with what skills and expertise; with what scale of resources, with what geographical focus;
 - how the proposed engagement is integrated with the overall strategy of the Client (including business planning, budgeting, other fundraising and public relations);
 - the resources to be applied by the Client in instructing, supporting and working with the Provider;
 - an outline of the proposed working relationship and service specification;
 - a budget taking account of internal time/costs and external costs;
 - projected results, taking account of uncertainties, contingencies and maximum, medium and minimum expectations;
 - timescale.

3.4 Selection of a Provider

- The Client **SHOULD** prepare a plan for the recruitment of a Provider, which includes:
 - sources of information on candidates. (See the Institute of Fundraising Directory online);
 - information to be supplied by applicants (relevant skills, expertise and experience, CVs, references, proposed approach to the brief);
 - information to be supplied to applicants (Client information, outline contract terms);

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- how to advertise the opportunity;
 - tendering procedures (if applicable);
 - short-listing, interview and selection criteria and procedures.
- The Client **SHOULD** ensure that decisions are taken at the right level within its organisation and with appropriate authority emanating from its Board of Trustees (or governing committee).

3.5 The Provider's Response

- The Provider **SHOULD** provide a written response to the brief (in any required format) covering:
 - general fundraising experience;
 - experience of the particular required activities;
 - knowledge of the particular fundraising environment;
 - resources available, including key personnel;
 - support, information and resources required from the Client;
 - the basis for the calculation and invoicing of fees and expenses;
 - anything in the brief which may need revision;
 - (if appropriate) a developed service specification; and
 - a description of the proposed approach to the work and applicable methodology.

3.6 Risk

There are financial risks for both parties - Clients pay against a (managed) hope of financial return; payments to Providers may, and their ongoing engagements will, be linked to (uncertain) success.

There are reputational risks for both parties - Clients may be associated with damaging fundraising practices (including those of a Provider's sub-contractors); Providers may be associated with a Client's organisational problems.

A Client could be exposed to liability because of a Provider (or sub-contractor) acting in its name, or through itself acting on a Provider's bad advice.

- Pre-contract dialogue **SHOULD** aim to ensure both parties are aware of relevant risks and that appropriate risk mitigation measures (including if contractual risk allocation and insurance) are in place (risk management is not the same as risk avoidance).

The nature, level, or share of risk may have a bearing on methods, or levels of payment. For example, in some cases Clients may need to make up-front payments against future return to set up a fundraising programme, or payments to Providers may be linked to levels of return (see 2.7.5).

- Risk management **SHOULD** continue for the duration of the contract.

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- Risk in Fundraising Contracts is relevant to the requirement that charity Clients in England and Wales **MUST*** include in their annual reports a statement confirming that major risks to which they are exposed have been reviewed and systems have been established to mitigate such risks (Charities Accounts and Reports Regulations 2005).

3.7 Reflecting the Working Relationship in the Fundraising Contract

3.7.1 Legal advice

- Each party **SHOULD** assess its need for legal advice to ensure the contract precisely and fully reflects the actual agreement and meets regulatory requirements. If legal advice is required, this **SHOULD** be taken independently by each party.

The greater the complexity, importance, value or risk, the more such advice is appropriate.

It may be sufficient to seek advice only on major issues, but the overall coherence of a contract is itself important.

Legal advice is most cost-effective if the adviser is given, in good time, a full written description of the proposed working relationship, with notes on critical and outstanding issues.

Check the adviser has the necessary areas of expertise .

The Institute of Fundraising provides a helpline which may assist in obtaining appropriate advice.

3.7.2 Use of Model Agreement (see Appendix)

- The Model is designed so that its principal clauses will be generally applicable to most Fundraising Contracts and so the specific details of each (including variations to the standard terms) may be included in schedules.
- As the Model is of general application it will need to be adapted to the circumstances of each case. Legal advice for that purpose may be necessary.
- Alternatively, the Model may serve as a checklist.
- Simple Fundraising Contracts may require the Model to be condensed, while complex Fundraising Contracts may require the Model to be expanded.

3.7.3 Specification (Model Clauses A, 2.1, 4.1 and Schedule 2)

- The most important provisions in the Contract are those that define the services to be provided. These are contained in the agreed “specification”, which **MUST*** include or cover:

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- a statement of the overall objectives of the Contract;
- the capacity in which the Provider is to act in providing the services (Professional Fundraiser/Consultant);
- a precise description of the services to be provided, methods to be used and the timescales for their provision ;
- precise provisions for the transfer of funds to the Client;
- the Provider “inputs”, i.e. Provider resources to be applied, in the proper performance of the Contract, for example, key personnel and general staff time, Provider funds (reimbursable and non-reimbursable), materials, equipment;
- the Client “inputs” i.e. Client resources to be applied to facilitate proper performance of the Contract, for example, office space, key personnel and general staff time, Client funds, information, materials, equipment;
- “outputs” integral to achieving the Contract objectives, i.e. performance requirements, which will indicate breach of contract by the Provider if they are not achieved and “targets”, which the Provider will commit itself to using reasonable endeavours to achieve;
- “key performance indicators”, by which the Provider’s contractual performance will be assessed; and
- “milestones” which will identify stages in the Contract when relevant outputs are intended to have been achieved.

3.7.4 Standards (Model Clauses 3 and 7 and Schedule 2)

The Contract should specify the performance standards. These should include relevant:

- legal requirements (see Section 5.0);
- codes of practice;
- standards related to the specification, as promised by the Provider, or required by the Client;
- standards to protect the integrity of the Client as a publicly accountable organisation; and
- requirements for delivery of funds, record keeping and access to records.

3.7.5 Payments to the Provider (Model Clause 5 and Schedule 4)

- The fees the Provider is to be paid, or the basis upon which they will be calculated **MUST*** be clearly stated.
- Any expenses the Provider may claim in addition to fees and verification requirements **MUST*** be clearly stated.
- Applicable VAT and invoicing arrangements **SHOULD** be clearly stated.

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- Any allowance for variation of payment levels **OUGHT** to be clearly justified by reference to the particular circumstances and to include a variation mechanism allowing the Client the option to terminate before a variation takes effect.
- Types of and means of payment will vary according to the type of service being provided and may include payments triggered by the achievement of specified outputs. Payment **OUGHT** to be precisely and proportionately related to service delivery and precisely described in the Contract.
- Clients and Providers **SHOULD** be familiar with Institute of Fundraising guidance on the relative merits of different payment methods and or fundraising cost to benefit ratios, (see, in particular, the Payment of Fundraisers Code of Fundraising Practice).

3.8 Sustaining and building the working relationship

- The Contract **MUST*** be considered, negotiated, agreed and signed and dated by authorised representatives of both parties before its commencement.
- The Contract **SHOULD** focus on the development of the working relationship between Provider and Client.
- Practical contract management (Model Clauses 2.2, 4.4 and 7) is important in this. Each party **SHOULD** be clear about its principal contact in the other organisation for the purposes of obtaining instructions, liaison, reporting, contract variation, problem-solving and review.
- Contacts at all levels **SHOULD** be co-ordinated, and in the Client's case **MUST** emanate from the authority of its Board of Trustees (or governing committee).
- Variation **MUST*** be by written agreement only, unless there is a clear justification for unilateral variation (for example, a need to respond to variable circumstances), in which case a procedure **MUST*** be included in the Contract, giving the other party an option to terminate, before change, if the variation is significant and unfavourable.
- A Contract is a working document. Its core **SHOULD** be regular liaison and meetings assessing performance against the agreed key performance indicators, delivery of the agreed outputs and attainment of the agreed objectives.
- Review procedures **SHOULD** appear in the Contract and be set to ensure that the review process is concluded a reasonable time before any renewal decision is required. The aim is to resolve problems appropriately, but Clients **MUST*** consider performance at these reviews and decide whether further

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action is appropriate (such as invoking penalty clauses, or reviewing the agreement, for example.)

- It **SHOULD** be the aim to resolve problems within the working relationship. However, escalation to dispute **SHOULD** be anticipated in the Contract through provision of an agreed practical dispute resolution procedure. Model Clause 22.3 refers, as an example, to Centre for Dispute Resolution ('CEDR') mediation. This is one of a range of dispute resolutions procedures promoted by CEDR.

3.9 Measuring success

Net income raised through the Provider's engagement is one measure of success.

Others may include, on-time delivery, donor satisfaction, new long-term supporters, returns on investment, the tapping of new resources, the generation of new ideas, profile-raising, reputation building and providing the groundwork for future fundraising.

A Client's reputation may be damaged by association with questionable fundraising methods, or undermined by fundraising perceived as contrary to the Client's character or mission.

Overall success is a Provider/Client working relationship adding value to the Client's performance and capacity.

- The Contract **SHOULD** define the relevant measures at the outset.

4.0 Relations with Stakeholders

4.1 Beneficiaries

- The Client **OUGHT** to give the Provider full information on its beneficiaries, how it benefits them and how that should be presented. The Provider **OUGHT** to use that information in a focused and appropriate manner.

4.2 Potential and existing Client supporters

- The essence of a Fundraising Contract is the maximisation of the goodwill of potential and existing Client supporters. This **SHOULD NOT** be undermined by lack of awareness and **SHOULD** be maintained by appropriate follow-up – acknowledgements, information etc.

4.3 Other Voluntary and Community Organisations

Client fundraising has implications for other organisations in the same and other fields, in terms of competition for limited funds and the overall impact on the receptiveness of the public to future fundraising.

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- The scope for co-operative endeavour **SHOULD** always be in mind.

4.4 Regulators

The various regulators of fundraising, including the Charity Commission, the Office of the Scottish Charity Regulator, local authorities, the Information Commissioner, the Gaming Board and Customs and Excise have a role in the maintenance of proper standards in Fundraising Contracts covering the areas they regulate

5.0 Key Legal or Tax Points

5.1 Professional Fundraisers

England and Wales

As defined in the Charities Act 1992 in England and Wales, a professional fundraiser is:

- any person (apart from the charitable institution or a company connected with such an institution) who carries on a fundraising business for gain which is wholly or primarily engaged in soliciting or otherwise procuring money or other property for charitable, philanthropic or benevolent purposes; or
- any other person who solicits for reward money or other property apart from:
 - any charitable institution or connected company;
 - any officer, employee or trustee of a charity or connected company acting in his capacity as such. Note, however, that although excluded from the definition, these people are now required to make solicitation statements as if they were professional fundraisers (see Section 7.3);
 - any charity trustee;
 - any public charitable collector – other than promoters;
 - people who solicit funds on TV or radio; or
 - any commercial participator.

In addition, the definition of a professional fundraiser in England and Wales does not apply to a fundraiser who does not carry on a fundraising business if the fundraiser receives £1,000 or less by way of remuneration in connection with a particular venture or £10 per day or £1,000 or less per year.

Scotland

In Scotland, a professional fundraiser as defined by the Charities and Trustee Investment (Scotland) Act 2005 is any person (other than a benevolent body or a company connected with it) who carries on a fundraising business, or any other

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person who for reward solicits money or other property for the benefit of a benevolent body or for charitable, benevolent or philanthropic purposes other than in the course of a fundraising venture undertaken by a person who carries out a fundraising business. There is no lower earnings limit for the definition of professional fundraisers in Scotland.

The definition of professional fundraisers includes consultants who ask for donations and agencies who use freelancers for face-to-face or telephone fundraising.

- When fundraising organisations are working with professional fundraisers, a signed written agreement **MUST** be in place containing certain mandatory provisions.

See the 'Best Practice for Fundraising Contracts' and 'Charities Working With Business' Codes of Fundraising Practice and the Institute of Fundraising's model contracts for further information (see Section 8.1).

UK

5.2 Regulation of Professional Fundraisers

Every contract between a Professional Fundraiser and a "charity or other institution established for charitable, benevolent or philanthropic purposes" is, in England and Wales and Scotland, regulated to protect the public from being misled. This is because (unlike Consultants) Professional Fundraisers ask directly for money from the public. Clients and Providers should ensure they are familiar with the relevant legislation.

- Every regulated contract **MUST*** be in writing and contain the following prescribed information:
 - names and addresses of the parties;
 - date and duration of the contract;
 - any terms dealing with early termination or variation;
 - a statement of the principal objectives of the contract and the methods to be used to achieve those objectives;
 - terms for the payment of fees and expenses to the Professional Fundraiser; and
 - if more than one charity is involved, how funds raised will be shared between them: (Section 59(1) of the Act/the Regulations).

5.2.1 Solicitation Statements

England and Wales

In England and Wales, professional fundraisers (see Section 5.0) and in-house fundraisers and trustees of a fundraising organisation **MUST*** make a solicitation statement every time they solicit donations on behalf of a fundraising organisation.

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In the case of telephone fundraising, the appropriate statement **MUST*** be made during each call.

Professional fundraisers **MUST*** give the following information:

- the name of the fundraising organisation(s) on whose behalf they are calling;
- if there is more than one organisation, the proportion in which they will each benefit;
- the method by which the fundraiser's remuneration is to be determined; and
 - where known, the actual amount of the remuneration; or
 - where unknown, an estimate of the remuneration, calculated as accurately as possible.

In-house fundraisers and trustees **MUST*** give the following information:

- the name of the fundraising organisation(s) on whose behalf they are calling;
- if there is more than one organisation, the proportion in which they will each benefit;
- the fact that (s)he is an employee/trustee of the fundraising organisation; and
- that (s)he is receiving remuneration as an employee, if applicable.

Failure to observe the relevant requirement in every case will lead to a criminal offence being committed by the external telephone fundraiser or in-house fundraiser. This requirement applies equally to solicitations of direct support and to solicitations of pledges of support that will be realised after the telephone conversation itself. Further information and guidance is available from the Office of the Third Sector (see Section 5.3) and/or professional advice **SHOULD** be sought.

- A Professional Fundraiser **MUST*** comply with further specific disclosure requirements in relation to television, radio and telephone appeals: (Sections 60(4)(5)(6) of the Act), including rights to cancel a donation and receive refund (Section 61 of the Act).
- A Professional Fundraiser **MUST*** make its books, documents and records relating to the Contract available for inspection by the Client and pass on funds to the Client as soon as reasonably practicable and within a maximum of 28 days.

Scotland

The following information **MUST*** always be given during the solicitation:

- if the Professional Fundraisers is seeking funds on behalf of a particular benevolent body:
 - the name of the benevolent body;
 - if more than one body is to benefit, details of the proportion of funds raised which each body will receive; *or*

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- if the Professional Fundraiser is seeking funds for general charitable, benevolent or philanthropic purposes (rather than a particular body):
 - an indication of this fact; and
 - details of how the distribution of the funds will be determined.
- If they are a benevolent fundraiser, which means any benevolent body and companies connected with it and any person who is associated with the body or connected companies either as a charity trustee, an employee or agent or as a volunteer, they **MUST*** indicate if they are to receive remuneration.
- If they are a professional fundraiser, which means any person, or the employee of any person, who carries on a fundraising business or who, in return for a financial reward or any other benefit, seeks money or other property for a benevolent body or for general charitable, benevolent or philanthropic purposes, they **MUST*** state whether they are to receive remuneration and, if so, the way in which the remuneration will be determined. The professional fundraiser **MUST*** also state the actual amount of remuneration if known at that time or, if it is not known, the estimated amount of remuneration.

UK

A Professional Fundraiser commits a criminal offence by failing to comply with any of these provisions and the trustees of a Client may be in breach of their duty of care.

5.3 Regulation of specific fundraising methods and activities

- Other Institute of Fundraising Codes **OUGHT** to be consulted in relation to specifically regulated fundraising methods and activities such as:
 - Fundraising through Electronic Media;
 - House-to-House Collections;
 - Face-to-Face Activity;
 - Committed Giving in the Workplace;
 - Raffles and Lotteries;
 - Event Fundraising;
 - Charity Challenge Events; and
 - Public charitable Collections in Scotland.

Fundraising methods and activities are subject to regulation under the general law, for example in relation to sale of goods and services, health and safety and licensing.

5.4 Guidance on some important key drafting issues

5.4.1 Copyright

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Written materials, artwork, software and other copyright materials are produced by Providers under Fundraising Contracts. The author of copyright material is its first owner.

- Clients **OUGHT** to ensure that copyright in such materials in respect of which they expect to own the copyright is transferred explicitly in the Contract.
- Providers **OUGHT** to ensure they obtain necessary transfers of copyright from subcontractors.

Copyright, as appropriate, may also be licensed exclusively/non-exclusively, for limited terms/irrevocably, for royalties/no payment, with or without sub-licensing rights.

- Post-contract ownership **OUGHT** to be considered.

5.4.2 Data

Fundraising Contracts may involve the handling of protected data relating to supporters and others.

Both parties must ensure that, in relation to the Fundraising Contract, they comply with their obligations under data protection legislation (see the Data Protection Code of Fundraising Practice).

Rights in the compilation and ownership of databases and mailing lists should be clear and may need assignment in the same way as copyright.

5.4.3 Indemnities

Indemnities are contractual clauses which ascribe particular responsibility for loss if things go wrong. A party that “indemnifies” another is accepting responsibility for loss the other may suffer. An indemnity clause either:

- transfers risk to protect a party which might otherwise be exposed to that risk; or
- reinforces a party’s existing responsibility for risk.

Advice may be needed to be clear about the appropriateness or effect of an indemnity clause.

5.4.4 Limitation of liability

- Limitation of liability often causes difficulty in contract negotiations.
- In each case the party seeking to rely on the limitation **SHOULD** justify its inclusion and the other party **SHOULD** make a judgment that it is reasonably covered, allowing for the limitation, on a worst case scenario.

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- Respective resources and insurance cover are relevant considerations.
- Such clauses must, in law, be reasonable when included in standard terms and/or contracts with members of the public.
- It is often accepted that “consequential” or “indirect” loss may be excluded, leaving direct loss to be reasonably limited. But precise definition of such terms is important.

5.4.5 Control of sub-contracts

- Clients **SHOULD** ensure that they have adequate control over sub-contracting arrangements. This means making them subject to client consent.
- Providers **SHOULD** ensure that sub-contracts are in place and that they effectively and fully pass on the contractual obligations to be assumed by the sub-contractor.

5.4.6 Exclusivity/contractual restrictions

- In some cases either party may seek an exclusive relationship, or to impose post-contractual restrictions on the other’s activity. Both **SHOULD** be specifically justified and any restriction **MUST** only be as extensive as is necessary to protect a legitimate interest.

5.4.7 Provisions for the handling of money

Some Fundraising Contracts will, because of their particular nature or scale, require particular provisions to ensure the proper handling of funds. The timing and method of fund transfers from Provider to Client may need to be prescribed, and the holding of funds by the Provider in a separate designated account, perhaps over which the Client has mandate control, may be required.

- What happens on termination **SHOULD** also be addressed.

5.5 Tax points

Provider services will be subject to VAT legislation, but may be subject to the rules governing exemption and zero rating. Advice is important in this area.

5.6 General Charity Law

- All decisions by charitable Clients in relation to Fundraising Contracts **MUST** be made in accordance with the general charity law principles requiring reasonable and prudent action in the best interests of the Charity.

The Governing Boards of Clients must ensure they act within the scope of their powers of delegation. This applies to the engagement of a Professional Fundraiser

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as it does to the engagement of an investment manager or any other agent. In England and Wales the scope of that authority will normally be determined by, or with reference to, provisions of the Trustee Act 2000 concerning agents. The relevant general rules prevail over this Code in the possible event of any inconsistency.

- Under the Trustee Act 2000 if unincorporated in England and Wales) Clients **MUST** or otherwise **SHOULD** give special consideration to permitting an agent to appoint a substitute, any restriction on the liability of a Provider and permitting any conflict of interest situation.

5.7 Scotland and Northern Ireland

This Code and the Model Fundraising Contract are based on the law of England and Wales. Scotland and Northern Ireland are separate legal jurisdictions. There are few differences, but some are identified (see Section 2.0 above).

Note the Institute of Fundraising Code of Fundraising Practice, 'Scottish Charity Law in Relation to Fundraising and Public Charitable Collections'.

The choice of the law to govern a fund-raising contract is normally a matter for the parties to it, although where both parties are in the same jurisdiction they are likely to choose the law of that jurisdiction. In a case where the Charities Act 1992 section 59 applies, the law of the contract **MUST*** be that of England and Wales. But this provision only applies to fundraising in England and Wales. It would not apply to a client in England and Wales which engages a provider to raise funds outside England and Wales. Scotland and Northern Ireland are each legal jurisdictions separate from the jurisdiction of England & Wales. If a Fundraising Contract is between two Scottish, or two Northern Irish, parties, Scottish or Northern Irish law may be applied (see Clause 26 and Schedule 2 Paragraph 8 of the Model Fundraising Contract). In such a case it would be advisable to review the relevant contract with reference to the applicable law.

6.0 Appendices

6.1 Useful Contacts

- CEDR (Centre for Effective Dispute Resolution)
www.cedr.co.uk
- Charity Law Association
www.charitylawassociation.org.uk
- Institute of Fundraising Directory
www.directory.institute-of-fundraising.org.uk

6.2 Model Agreement between a Client and a Provider

Notes on using the Model:

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- The Model is intended to provide a starting point or check-list for drafting a Fundraising Contract and to be adapted to the particular subject-matter and particular requirements.
- The prescribed provisions for Professional Fundraiser Contracts are covered*.
- Clauses 1-27 are generic standard terms and conditions, which are intended to strike a reasonable balance between the interests of Community and Voluntary Organisations and Providers.
- All specific detail for the particular Fundraising Contract may be inserted into the Schedules. Such detail may include specific variations to the standard terms and conditions (see Clause 27).
- A word beginning with a capital letter indicates that it is being used as a defined term. The applicable definitions are set out in Schedule 7.
- Consideration should be given to whether legal advice is required.
- Consideration should be given to whether the contract should be entered into by a subsidiary trading company rather than a charitable Community and Voluntary Organisation itself. This may be necessary if the fundraising would be legally defined as “trading” (subject to certain exceptions). Legal advice should be taken where there is uncertainty on this point.
- The Model is drafted by reference to the law of England and Wales and may need appropriate review if it is made subject to the law of Scotland or the law of Northern Ireland.

6.3 Working Party

- Julian Blake (Chair)
- Paul Farthing
- Geoff Howard
- Sandra Lynch
- Susan Robinson
- Emma Sambrook
- Cathy Sullivan
- Maggie Taylor
- Christine Tozer
- Jenny Walters

7.0 Model Contract

Fundraising Agreement

Date:

Between:

The **Client** (1) and the **Provider** (2) each of whose details are set out in Schedule 1.

Background:

- (A) The Client wishes to raise funds for its public benefit objects and specifically the purposes stated in the Specification.
- (B) The Provider has expertise in the provision of fundraising services.

Terms and conditions:

1. Interpretation

Definitions and interpretation provisions set out in Schedule 7 apply.

2. Service Delivery

- 2.1 The Provider shall in the capacity specified in Schedule 1 provide the Fundraising Services in the applicable Area (if any) for the Contract Period, in accordance with the Specification and the Standards.
- 2.2 The Provider shall, for the Contract Period, maintain a Provider Contact approved by the Client (such approval not to be unreasonably withheld).

3. Standards

- 3.1 The Provider shall provide the Fundraising Services to the Client with reasonable care, skill and diligence, in accordance with:
 - 3.1.1 all applicable legal requirements;
 - 3.1.2 the Institute of Fundraising Code of Practice, 'Best Practice for Fundraising Contracts' and any other code of practice applicable to the Provider, and/or the Fundraising Services and/or this Agreement and/or (as notified in writing to the Provider) the Client;
 - 3.1.3 the elements in the Specification prescribing service standards;

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- 3.1.4 obligations of the Client under any grant, contract, or statutory duty, or otherwise as notified in writing by the Client to the Provider;
- 3.1.5 further reasonable Client instructions within the scope of the Specification.
- 3.2 The Provider shall in providing the Fundraising Services act at all times in the manner which:
 - 3.2.1 promotes the public benefit purposes of the Client;
 - 3.2.2 in the reasonable opinion of the Client does not and is not likely to damage its good name, image, reputation, or intellectual property rights;
 - 3.2.3 is not misleading and does not impose upon or create for the Client any liability (except any expressly provided for under this Agreement).
- 3.3 If there is any inconsistency between the principal terms and conditions of this Agreement and/or the Specification and/or the Standards, or between any of the Standards (subject to contrary agreement) the more demanding requirement shall apply.
- 3.4 Without prejudice to Clause 3.1 the Provider shall ensure that:
 - 3.4.1 it has adequate resources to provide the Fundraising Services properly and efficiently throughout the Contract Period;
 - 3.4.2 Provider Personnel are fully and properly trained and supervised in accordance with and fully comply with all specified criteria and requirements in the Standards;
 - 3.4.3 Provider sub-contractors are reasonably selected and supervised and comply with the terms and conditions of this Agreement.
- 3.5 The Provider shall (without prejudice to Clause 3.1), comply with any agreed minimum requirements and use its reasonable endeavours to meet any agreed performance targets.
- 3.6 If the Provider is a Professional Fundraiser, the Professional Fundraiser statutory statement agreed in Schedule 3 shall be made in relation to every representation in relation to this Agreement that funds are being raised for charitable purposes.

4. Client's obligations

The Client shall:

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- 4.1 provide all co-operation, information and support reasonably requested by the Provider in relation to its provision of the Services;
- 4.2 provide access to all operational and financial information reasonably requested by the Provider to enable to it perform its obligations under this Agreement;
- 4.3 ensure all decisions of the Client in relation to this Agreement are made with proper authority emanating from its Board of Trustees (or governing committee) and that they are integrated with the Client's other operational, fundraising and promotional activities;
- 4.4 maintain a Client Contact for the Contract Period;
- 4.5 perform any specific Client obligations set out in the Specification.

5. Payments to the Provider

- 5.1 In return for the Fundraising Services the Client shall make payments of fees (including applicable expenses) to the Provider, on the payment terms set out in Schedule 4.
- 5.2 All payments under this Agreement are exclusive of applicable VAT unless otherwise stated.
- 5.3 All expenses which the Provider is entitled to claim under this Agreement in addition to, or as part of, payments for the services, shall be payable only against receipts, or other written evidence that they were properly incurred, as reasonably required by the Client.

6. Late payment interest

Each party shall be entitled to charge interest at 4% above the base rate for the time being of the Client's principal bank, calculated on a daily basis on the balance of any overdue payment due to it from the other party (before and after any judgment).

7. Liaison, reporting and review

- 7.1 The parties shall ensure that their authorised representatives and in particular the Primary Contacts meet as often as is necessary during the Contract Period for the proper and efficient delivery of the Fundraising Services and at least as often as is specified in Schedule 5.
- 7.2 The Provider shall, in addition to oral reporting in and outside meetings, provide written reports containing reasonable detail to the Client during and at the end of the Contract Period, as specified in Schedule 5, in respect of its performance of the Fundraising Services with reference to Key Performance Indicators.

- 7.3 The parties shall undertake formal reviews of this Agreement in accordance with any review timetable specified in Schedule 5 and at least a reasonable time prior to any prospective renewal date.

8. Record keeping, rights of inspection

- 8.1 Each party shall apply proper financial and management systems and properly maintain and update records (respectively, in accordance with any requirements specified in Schedule 5), for the Contract Period and maintain them for at least two years after termination or expiry of this Agreement.

- 8.2 Each party shall on reasonable notice and at reasonable times and otherwise in accordance with the other's reasonable instructions, permit any authorised representative of the other, and in the case of the Provider, any funder or regulator of the Client requiring such access under its arrangements with the Client, to inspect and take copies of any of the records and the Provider shall procure for the Client and such funders and regulators the same rights in respect of all Provider Sub-contractors.

9. Client intellectual property rights

The Client licenses the Provider, as non-exclusive licensee for the Contract Period, in delivering the Fundraising Services, in accordance with this Agreement only, to use Client intellectual property rights in accordance with necessarily implied or express provisions of this Agreement (including the Client's reasonable instructions) and nothing in relation to this Agreement shall otherwise imply any transfer or further licensing of any such rights.

10. Copyright and database rights

- 10.1 The Provider assigns copyright and database rights to the Client in all Client specific materials (in any medium) generated under this Agreement.

- 10.2 Such assignment does not extend to rights in material developed by the Provider independently from this Agreement, or generic materials produced under this Agreement, except as incorporated into Client specific materials.

- 10.3 The Provider grants the Client a non-exclusive, perpetual, non-transferable, royalty-free licence to use such incorporated generic material to the extent it is so incorporated.

11. Confidentiality and Publicity

- 11.1 Both parties shall keep in confidence any information of a confidential nature obtained under this Agreement, or relating to this Agreement and shall not use or divulge it to any person without the written consent of the other party.

- 11.2 The preceding clause does not apply to information:

- 11.2.1 in the public domain (otherwise than by breach of this Agreement);
 - 11.2.2 in the lawful possession of the receiving party prior to the date of this Agreement (other than through liaison between the parties prior to and in anticipation of this Agreement);
 - 11.2.3 obtained from a third party free to divulge it;
 - 11.2.4 required to be disclosed by a Court or other competent authority;
 - 11.2.5 properly disclosed on a confidential basis to personnel, sub-contractors or professional advisers of the respective parties, for the purposes of this Agreement.
- 11.3 No public announcement or other publicity concerning this Agreement shall, unless required by law or competent authority, be made, or issued, by either party, without the prior written consent of the other.

12. Data capture and protection

- 12.1 The Provider shall capture such Data under this Agreement and in such form as may be prescribed in the Specification.
- 12.2 All Data supplied by the Client to the Provider, or captured by the Provider, or any Provider Sub-contractor shall be used by the Provider and (as the Provider shall procure) any Provider Sub-contractor, only for the purposes of and in accordance with the provisions of this Agreement.
- 12.3 The Provider shall, on termination or expiry of this Agreement, as soon as is reasonably practicable, return or provide (as applicable) all copies of such Data to the Client or destroy all such copies in accordance with the Client's reasonable instructions.
- 12.4 Each party shall ensure that all its respective legal obligations concerning data protection are complied with in respect of all Data.

13. Indemnity

- 13.1 The Provider shall indemnify the Client in respect of any liability to any third party arising as a result of any acts or omissions of Provider Personnel, or Provider Sub-contractors, employed or engaged by the Provider in relation to this Agreement.
- 13.2 The Client shall ensure that the Provider is reasonably consulted and informed by the Client in relation to any claims made, or proceedings initiated, by any third party which are relevant to Clause 13.1 and in particular that the Provider has a reasonable opportunity to comment on the terms of any proposed payment or settlement of any such claim or proceedings.

14. Insurance

- 14.1 The Provider shall have in place and maintain for and in relation to the Contract Period appropriate insurance against all risks normally covered by a comprehensive policy of insurance in respect of the provision of services in the nature of the Fundraising Services, including adequate public liability insurance.
- 14.2 The Provider shall, on request, provide to the Client a copy of the insurance policy or policies required under Clause 14.1 with reasonable evidence of payment of the respective current premium(s).

15. Limitation of liability

The appropriateness of any limitation of liability under this Agreement has been specifically explained by the party seeking such limitation, specifically agreed and is set out in Schedule 6.

16. Termination

- 16.1 Any right of termination of this Agreement by written notice is specified in Schedule 1.
- 16.2 Either party may terminate this Agreement forthwith by written notice if the other party:
- 16.2.1 has committed a fundamental breach of this Agreement;
 - 16.2.2 is in breach of the Agreement and has failed to remedy such breach within 14 days of receipt of a written notice from the notifying party requiring the breach to be remedied;
 - 16.2.3 repeats any breach in respect of which a remedy notice was issued;
 - 16.2.4 commits or suffers any Insolvency Event.
- 16.3 The Client shall be entitled to terminate this Agreement forthwith by written notice if:
- 16.3.1 Any Key Individual specified in the Specification ceases to be personally available to deliver the Services for a material period and is not replaced to the satisfaction of the Client;
 - 16.3.2 the Provider becomes subject to the Control of any party which does not Control it at the Agreement Date.

17. Consequences of Termination

- 17.1 In the event of any termination of this Agreement (provided termination is not by reason of the Client's default) the Client shall be entitled, at its option,

to assume direct responsibility for the relevant fundraising activities and/or to appoint any third party or parties to promote and continue such activities and the Provider shall provide reasonable co-operation to ensure, as far as possible, continuity of such activities.

17.2 Any right to terminate and the Client's right under Clause 17.1 are without prejudice to any other rights in respect of any relevant breach and to rights which accrued prior to termination.

17.3 Any provision of this Agreement which expressly or by necessary implication is intended to have effect after expiry or termination of this Agreement shall continue to have such effect for the intended further period.

18. Amendment

The Agreement may be amended only in writing signed by or on behalf of each party (subject to any rights of either party in writing and on reasonable notice reasonably to update or vary, payment provisions, the Specification, or any other provision of this Agreement, as specified in Schedules 4 or 5).

19. Force Majeure

19.1 Neither party shall be liable for any delay in performing any of its obligations under this Agreement if such delay is caused by circumstances beyond its reasonable control, (subject to giving the other party full particulars of the circumstances and using all reasonable endeavours to resume performance as soon as possible). Such circumstances shall not include strikes or industrial disputes (except where affecting similar businesses in similar circumstances), failures by sub-contractors (except where due to strikes or industrial disputes affecting similar businesses in similar circumstances) or shortages of labour.

19.2 A party exposed to force majeure delay under Clause 19.1 shall be entitled to terminate this Agreement on written notice.

20. Non-Waiver

No forbearance or delay by either party in enforcing provisions of this Agreement shall prejudice or restrict the rights of that party, nor shall any waiver of rights in respect of any breach of this Agreement operate as a waiver of any rights in respect of any other breach.

21. Assignment and sub-contracting

21.1 Neither party may assign the benefit of this Agreement without the written consent of the other.

21.2 The Provider may only sub-contract performance of its obligations under this Agreement, as specified in the Specification, or as agreed in writing by the Client.

22. Dispute Resolution

- 22.1 Any dispute arising in connection with this Agreement shall be notified in writing by one party to the other and shall first be addressed by direct personal liaison between the respective Primary Contacts.
- 22.2 If any dispute has not been resolved under clause 22.1 within 10 Working Days of such notification, the matter shall (if applicable) be referred to be resolved by direct liaison between more senior individuals nominated by each party.
- 22.3 If any dispute has not been resolved by such senior officers within a further 10 Working Days the matter may be referred at the option of either party, within a further 5 Working Days, to mediation in accordance with the Model Mediation Procedure for the time being of the Centre for Dispute Resolution (Registered Company Number: 2422813; Registered Charity Number 1060369; www.cedr.co.uk) and where any such reference is made neither party shall commence legal proceedings in respect of the relevant matter until such procedure is complete.

23. Notices

- 23.1 Any notice from either party to the other under this Agreement may be personally delivered, or sent by recorded delivery to the address of the other party as set out in the heading to this Agreement, or as otherwise notified in writing, or by transmission, with due transmission receipt, to a fax number or e-mail address notified in writing for the purpose.
- 23.2 Any personally delivered, faxed or e-mailed notice shall be deemed received on the day it was delivered or sent if it was delivered or sent on a Working Day before 4.30pm and otherwise on the next Working Day.

24. Entire Agreement

The Agreement (incorporating its Schedules) is the exclusive statement of the agreement between the parties in relation to the Fundraising Services. It supersedes all previous communications, representations, arrangements and agreements between the parties relating to the Fundraising Services.

25. Third Parties Rights

This Agreement does not and is not intended to provide any third party with any rights under the Contracts (Rights of Third Parties) Act 1999 or otherwise.

26. Law

This Agreement is governed by and shall be construed in accordance with the law of England and Wales, unless otherwise specified in Schedule 2.

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27. Special terms and conditions

The above terms and conditions apply subject to any special terms and conditions set out in Schedule 6.

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In Witness the parties have below executed this Agreement with effect from the date in the heading

Signed:

On behalf of the Client

Name:

Position:

Signed:

On behalf of the Provider

Name:

Position:

SCHEDULE 1

Particular contract details

1. Client details

Name:

Legal Status:

Registered/Principal Office:

Registered Company Number:

Registered Charity Number:

2. Provider details

Name:

Legal Status:

Registered/Principal Office:

Registered Company Number:

3. Provider Fundraiser Status in relation to this Agreement

[Professional Fundraiser/Consultant/both]

4. Fundraising Objectives

4.1 Objectives

4.2 Means of achieving them

5. Contract Period

From:

To:

6. Termination on notice provision

This Agreement may be terminated by [one or either party] giving [] [weeks/months] written notice to the other [up to []]

7. Area

The Provider is appointed to provide the Fundraising Services in the following

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geographical area:

[].

8. Governing Law [N.B. *any drafting changes required by Scottish/Northern Irish law*]

SCHEDULE 2

Specification

1. [Description of Fundraising Services and delivery timescales]
2. [Provisions relating to the transfer of funds to the Client]
3. [Resources to be applied by Provider in delivering the Fundraising Services]
 - 3.1 Key personnel
 - 3.2 Money
 - 3.3 Materials
 - 3.4 Equipment
 - 3.5 [Other]
4. [Resources to be applied by Client in supporting delivery of the Fundraising Services]
 - 4.1 Key personnel
 - 4.2 Office space
 - 4.3 Money
 - 4.4 Information
 - 4.5 Materials
 - 4.6 Equipment
 - 4.7 [Other]
5. [Outputs]
 - Performance Requirements;
 - Targets to be pursued with reasonable endeavours]
6. [Key Performance Indicators]
7. [Milestones].

SCHEDULE 3

Professional Fundraiser statutory statement (if applicable)

Example: [Provider] will receive a fee of £x for services provided in relation to this [fundraising campaign].
X, a registered charity, and Y, a registered charity, will each receive 50% of the net proceeds.

[NB. The agreed statement must reflect the actual arrangements].

SCHEDULE 4

Payments to Provider

1. [Fee payment schedule]
2. [Expenses schedule]
3. [Payment terms]
4. [Price variation mechanism (if applicable)]

SCHEDULE 5

Contract management provisions

1. [Provider Contact details]
2. [Client Contact details]
3. [Liaison meeting regime]
4. [Reporting regime]
5. [Review/renewal process]

SCHEDULE 6

Special terms and conditions

1. [Any agreed limitation of liability – see Clause 15]
2. [Any agreed amendment procedure – see Clause 18]
3. [Any variation to the principal terms and conditions – see Clause 27]
4. [Any other special terms and conditions]

SCHEDULE 7

Interpretation

1. In the Agreement the following definitions apply:

“Agreement Date”	the date of this Agreement;
“Area”	as specified in <i>Schedule 2</i> ;
“Client Contact”	the principal individual contact of the Client for the purposes of this Agreement;
“Contract Period”	as specified in <i>Schedule 2</i> ;
“Control”	ultimate control over more than 50% of the votes governing decisions in a relevant organisation;;
“Data”	all regulated data captured, controlled or processed in relation to this Agreement;
“Fundraising Services”	as outlined in <i>Schedule 1</i> and detailed in the Specification;
“Insolvency Event”	the calling of any creditors meeting; the appointment of any receiver, administrator, or administrative receiver over all or any part of assets or undertaking; the presentation of a winding-up or bankruptcy petition; the convening of a meeting to pass a winding up resolution; entering into liquidation; a bankruptcy petition issued in respect of any director, owner or key individual; the suspension or cessation of business; any threat to suspend or cease business;
“IOF Code”	the codes of practice for the time being of the Institute of Fundraising (Registered Charity Number: 1079573; www.institute-of-fundraising.org.uk);
“Key Performance Indicators”	as specified in the Specification;

- “Primary Contacts” the Client Contact and Provider Contact;
- “Provider Contact” the principal individual contact of the Provider for the purposes of this Agreement;
- “Provider Personnel” every individual employed or engaged by the Provider in delivering any part of the Fundraising Services, whether as agents, consultants, employees, independent contractors, volunteers or otherwise;
- “Provider Sub-contractors” every corporate person or other organisation providing services to the Provider in relation to this Agreement, including every individual employed or engaged by such sub-contractor in delivering any part such services, whether as agents, consultants, employees, independent contractors, volunteers or otherwise;
- “Specification” the methodology, content and details of the Fundraising Services as specified in *Schedule 2* (as amended from time to time by agreement between the parties);
- “Standards” as specified in Clause 3;
- “Working Day” 9.30am to 5.00pm Monday to Friday excluding official bank holidays in England and Wales.

2. In this Agreement (subject to manifest contrary intention):
- 2.1 the singular includes the plural and vice versa;
- 2.2 references to clauses, sub-clauses and schedules are to clauses, sub-clauses and schedules to this Agreement;
- 2.3 headings to clauses are for reference only and not interpretation;
- 2.4 references to statutory provisions respectively include any provision which amends, replaces or supplements them;

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- 2.5 every indicative list, or use of the words "including" or "in particular", or any cognate, or similar words apply without limitation and without prejudice to the generality.