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"The Future of State Charities Regulation"

The Future of State Regulation of Charities

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The subject assigned to me, "The Future of State Regulation of Charities", came with a request that I include some reflections on my experience as a state regulator some fifty years ago and as an observer and supporter of improved and expanded state regulation ever since then. Regulation of charities has two overriding purposes: (1) to assure accountability of fiduciaries and protect charitable assets, and (2) as part of a program of consumer protection to prevent misleading or fraudulent solicitations. This paper focuses on how the present scheme of state regulation developed, how and where it fits with federal regulation, and suggestions from scholars and practitioners as to how it might be improved. Finally, although my record for predicting changes is very poor, I will provide some surmises as to the future.

I. Historical Context of Charities Oversight by States

My first experience with state charity regulation was in 1960 when I was appointed an assistant attorney general in Massachusetts, and a member of and later the Director of the Division of Public Charities in the Office of the Attorney General. Our powers stemmed from a statute passed in 1954, enlarging on the long standing duty of the attorney general to assure the "due application of funds given or appropriated to public charities within the Commonwealth and prevent breaches in the administration thereof."

The statute established the Division, required all charities in the state other than religious ones to register with the Division and file annual reports detailing activities and finances, and expanded the Attorney General's power to conduct investigations. Under a separate statute enacted in the mid-1950s, charities soliciting funds from the general public, professional fund-raisers and solicitors were also required to register and file separate reports about their campaigns, and individuals handling contributions were required to post bonds. Until 1954, these records were handled in the criminal division in the office of the attorney general, but were transferred to the Charity Division upon its establishment in 1954.

We had a staff of five, two assistant attorneys general, one legal clerk, an executive secretary and a secretary-clerk. Investigators and accountants were assigned on an ad hoc basis to the Division when needed. Our duties included maintaining the register, monitoring the content of the annual filings, to monitor filings from charities intending to conduct public solicitations and issue licenses to professional solicitors, and investigate and prosecute breaches

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of duty by charitable trustees. In addition to these functions, we made a major effort to find nonfilers, we revised the reporting forms and sought court approval to consolidate a large number of charitable trusts with bank trustees whose fees absorbed any income generated by the assets and were, accordingly not supporting or conducting any charitable activities.

We also sought community support for our efforts, establishing an Advisory Committee comprised of 30 representatives of the charitable, financial and legal sectors from across the state who helped us consider ways to improve the various aspects of our work, including drafting new legislation to improve the operations of the Division. Subsequent attorneys general continued to constitute and rely on advisory committees until the 1980s. (Illinois and Michigan now require their establishment by statute). In addition we received two grants from the Boston Foundation, first to support publication of a list of private foundations in the state, followed by one with a list of all public charities registered with the Division, in both cases with contact information.

All of the foregoing was positive. The other side was the difficulty of identifying abuses unless they were brought to our attention by whistleblowers or the press, and once we had determined that there were abuses to be corrected, the difficulty of bringing some court actions with the limited staff and funds we had available. Nonetheless, we were able to prosecute successfully a number of charities who were misapplying charitable funds, and we handled a number of important cy pres and deviation cases.

I left the Charity Division at the end of 1962 following a change in administration, and then embarked on a study of state and federal regulation of private foundations, the results of which were published in 1964 by Russell Sage Foundation in a book entitled Foundations and Government: State and Federal Law and Supervision.

In 1964, the year in which my book was published, mandatory registration and reporting statutes were in effect in the office of the attorney general in ten states: New Hampshire, Rhode Island, Ohio, Massachusetts, Iowa, California, Illinois, Michigan, New York and Oregon. Rhode Island and South Carolina required reports only from trusts, not corporations. The Iowa statute was repealed in 1965 and Washington enacted the statute in 1959 and repealed it in 1997.[1]

The rationale for these mandatory reporting laws was that, while state laws in almost every state charged the attorney general with oversight of charities, without a reporting statute he would have no knowledge of the charities under his jurisdiction, let alone what their activities were.

State regulation of charitable fund raising was also within the jurisdiction of the attorney general, but it proceeded along a different path than that of attorney general regulation of fiduciaries. In the late 1950s and early 1960s, national and state health and welfare agencies became aware of an increase in misleading solicitations and instances of fraudulent campaigns. They led an effort to obtain state legislation to regulate fund raising activities and their efforts resulted in passage during the 1960s of legislation in 26 state requiring registration and reporting

[1] *See* Marion R. Fremont-Smith, Governing Nonprofit Organizations: Federal and State Law and Regulation , Harvard University (belknap) Press(2004). for history of regulation and descriptions of the law and practice in the states.

by charities of specific campaigns to raise funds, and licensing of professional fund raisers and paid solicitors. In some states such as Massachusetts and New York, the duties imposed on the attorney general were carried out within the same office as charity registration and reporting. In others, it was the secretary of state or the state welfare commission that was charged with administration of the statutes. Later, as consumer protection became an established function for an attorney general's office, regulation of charitable fund raising became an important component of those programs. Today there are 38 states in which fund-raising is regulated, although press reports of scandals involving fundraising activities by charities and for profit organizations that claim to be charities continue to appear with some regularity. A major problem for the regulators has been the inability to adequately prosecute charities, and so-called charities, that operate in a number of states or nation- wide and have the ability to move from one jurisdiction to another when attempts are made to prosecute them.

Of the nine states that require annual financial reports from charities and continue to actively monitor their activities and the five or six additional ones like Pennsylvania and Texas that actively regulate charities, no one of them considers that its programs are well staffed and adequately funded. In fact, one of the first drawbacks to increasing the number of states with active charity regulation is the lack of funds. However, for a state in which the office of the attorney general has a total staff of three or four, the inability to deal adequately with charitable issues is understandable.

Despite the fact that the number of states actively regulating charities has not grown in 50 years, much has been done by way of refining the operation of charity divisions in individual states, clarifying statutory provisions and cooperating with other state regulators. They have had active support from the National Association of Attorneys General, the National Association of State Charity Officials, and the Columbia Law School National State Attorneys General Program's Charities Regulation and Oversight Project.. The NASCO annual conferences and the meetings of the Exempt Organization Committee of the ABA Tax Section have provided opportunities for state regulators to meet with federal regulators and members of the charitable sector to discuss common problems. The paper by Karin Kunstler-Goldman and Belinda Johns, "Evolving State Regulation: From Index Cards To the Internet", which is a part of this conference series of papers, contains an excellent description of the status of current regulation within and among the states.

There have also been important developments in state law designed to improve administration of charity regulation. In 2011 the Commissioners on Uniform State Laws adopted a Model Protection of Charitable Assets Act, having repealed the earlier promulgated Uniform Act for Supervision of Charitable Trusts, when it appeared that it had not been considered by any state legislature for more than 20 years. The change in the title of the new act reflected both problems relating to whether the original act covered only trustees of charitable trusts or, as was intended, charities organized as nonprofit corporations and unincorporated associations. The acts originally passed in Illinois and Michigan were amended soon after their passage to clear the ambiguity, while in California the change was made before passage. The Uniform Management of Institutional Funds Act and its successor, the Uniform Prudent Management of Institutional Funds Act, (the later now in effect in all of the states and the District of Columbia, were both

designed to clarify the laws governing investment of charitable funds and provide uniformity among the state laws as to the legal standards to which fiduciaries would be held and the basis for prosecution for breach of duties by regulators and the courts.[2]

During these 50 years, there have been suggestions for improving state charity regulation other than by increasing the information available to the attorney general and adequately staffing his office. One common criticism of reliance on programs run in the office of the attorney general is that this office is often too influenced by political considerations. It is true that state attorneys general are either appointed by a governor or are elected by the voters in the state. However, reviewing the record in these last 50 plus years, there is little evidence of political bias in the administration of charity regulation. A serious example of state political interference occurred in Pennsylvania when the attorney general became involved in a proposed sale of the majority position held by the trustees of the Hershey Trust in securities of the Hershey Company. Concerned about the effect on the town of Hershey should the company be sold to buyers who would remove its operations to another venue, the Attorney General acted to stop the sale, and succeeded in persuading a local court to remove the trustees. He also succeeded in persuading the legislature to amend the state Prudent Man Rule governing investment of trust assets to require consideration of the effect of a sale of securities or of a company on the economy of a defined geographical area, a provision unique among state laws.

During the early years of the 21st century, large health care organizations owning property in more than one state were converting to for-profit status and in two instances the attorneys general in those states each claimed the assets for their own jurisdiction, causing a number of law suites, with conflicting claims. Compromises were eventually reached, with new foundations being established in each of the states involved, funded with a proportion of the proceeds of the sale. Critics of the proceedings believed that the attorneys general had wasted funds on what was considered frivolous litigation, arguing that the division of assets should have been negotiated prior to going to court.

II. Suggestions for Charities Oversight Reform

Critics of regulation by attorneys general suggest that this office is not suited to handle cases that need informed understanding of charity law, or that some states already cannot handle the large number of new charities being formed or predicted to be formed in the near future and others will also be unable to do so. They suggest that it would be better to transfer the powers of the attorney general to an independent state charity board, following the British pattern of regulation, with the office of the attorney general involved only when recourse to the courts is necessary. Kenneth Karst[3] and James Fishman[4] both wrote supporting such a proposal. Both suggested, however, that it was unlikely to be adopted in the near future. Lloyd Hitoshi Mayer

[2] Marion R. Fremont-Smith, The Search for Greater Accountability of Nonprofit Organizations: Recent Legal Developments and Proposals for Change, 76 Fordham L. Rev. 609 (2007).
[3] Kenneth L. Karst, The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility, 73 HARV. L. REV. 433 (1960).
[4] James J. Fishman, Improving Charitable Accountability, 62 Md. L. Rev. 218 (2003).

and Brendan M. Wilson analyzed the best situs for regulation of charities and concluded it should be in the states, but without a recommendation as to situs.

I have always argued for increasing the funds available for charity regulation and, with those funds, to support increasing the number of states actively regulating charities, while improving existing programs. One suggestion made in my 1964 book was for the federal government to provide a financial incentive to states to establish new or improve existing regulatory programs, using as precedent the administration of the unemployment compensation laws under which the federal governments has established minimum standards and requirements for their administration, which if adopted in any state results in a federal subsidy to the state to administer the program. Once a state program meets the federal standards federal action is confined to assuring that they are observed. There are other ways to provide financial incentives from the federal government, the decision as to whether they might ever be considered is quite clearly a political one.

In 2004, the Senate Finance Committee Staff issued a report containing recommendations for reforming oversight of charities. Included in a long list of recommendations for adopting changes in the administration of federal regulation of charities was one that called for providing federal funding to the states to establish or improve their regulation of charities. The Report suggested conditioning federal funding on a state adopting uniform filing requirements and minimum standards for oversight and enforcement. This proposal was adopted by the Panel on the Nonprofit Sector, established to respond to the Finance Committee staff recommendations under the leadership of Independent Sector. However, nearly 10 years later, with the exception of amendment to the Internal Revenue Code to further increase regulation of supporting organizations and credit counseling charities, no action has been take on the recommendations from either group.

The possibility of removing oversight of charities from the IRS to a separate national agency or to another existing federal agency such as the SEC, has been suggested by a number of scholars and observers of the charitable sector. Some of them suggest what would be federal preemption of charity regulation. Others have suggested, as did the Senate Finance Committee Staff Report, enhanced cooperation between the two levels of government. In his paper for this series entitled “Charity Oversight: An Alternative Approach”, Marcus Owens has proposed creation of a new quasi-independent board to determine eligibility for exemption and to police charities. He does suggest that this new charity regulatory organization might support state charity regulation efforts “where appropriate,” but otherwise does not address state regulation.

Two other recommendations from the Finance Committee Staff that received support of the state regulators and many commentators were (1) to improve the ability of the IRS to exchange information about pending cases with state regulators, and (2) to permit abatement of federal sanctions if the state attorney general and the state courts with jurisdiction over the charity were taking action to rectify alleged misdeeds. These are discussed in the following sections on federal regulation.

III. FEDERAL REGULATION OF CHARITIES AND THE INTERPLAY WITH STATE REGULATION

The underlying focus of federal regulation of charities is protection of the tax system from abuses by entities granted special privileges, namely tax exemptions and eligibility to receive tax deductable contributions. Actually, very little attention was paid to exempt charities until the late 1940s, when an annual reporting requirement was imposed by regulation, a requirement that was not widely observed. In 1950, Congress enacted the tax on unrelated business income of charities, required annual reporting from larger charities, and placed some limits on self dealing and accumulations of income on the group of exempt organizations that were later to be described in the Internal Revenue Code as private foundations.

As noted above, the only sanction for failure to comply with Internal Revenue Code provisions governing charities was loss of exemption, an entirely inappropriate sanction under which, if the state with jurisdiction did not act, meant that the fiduciaries who violated their duties could remain in place and continue the behavior that caused loss of exemption. The regulations promulgated in 1959, which included an organizational test, provided the basis for what has become a uniform law for charities in all jurisdictions, superseding any state laws that might not conform to the federal provisions. However, enforcement remained sporadic and the agents assigned to exempt organization cases rarely had training in the laws applicable to charities; rather, their expertise was in dealing with for-profit, taxable entities.

Passage of the Tax Reform Act of 1969 required a change in enforcement, as personnel with knowledge of its complicated provisions were needed to effectively audit the affected charities. This Act contained two specific provisions recognizing the role of the states and state law in charity governance. The most important of these was the provisions in section 507 of the IRS, under which the extreme penalty for violation of the restrictions of private foundations, a tax equal to all the foundations assets, could be abated if the Service had evidence that a state had taken corrective action to assure that the charity's assets would be preserved. The second related to a requirement that private foundations include in their governing documents provisions mandating that they comply with the restrictions in the Internal Code on their activities. An exception was made to this requirement if the state laws governing the foundation required such compliance. By 1964 all of the states and D.C. had enacted such legislation, Small in comparison to the large number of new limits on foundations, but nonetheless unique in charity regulation.

Unique also in the 1969 Tax Reform Act was the nature of the sanctions applicable for violation of the newly enacted restrictions. Instead of loss of tax exemption as the first level of sanctions, as it had been and still remained in regard to the universe of publicly supported charities, in the case of the prohibition against self-dealing, excise taxes could be applied to the self-dealer personally and to the fiduciaries of the charity who, knowingly and willfully, approved the transaction. Note that this tax did not apply to the charity's asses. In the case of the other restrictions, a mandatory annual pay out, a limit on business holdings, a requirement that investments comply with the "prudent man rule", (a rule developed under state law,) and a prohibition against any political activity or any expenditure other than for a charitable purpose, there was an excise tax on the foundation for violation, as well as on any of its fiduciaries who

knowingly and willfully approved the expenditures. The Act also included increased reporting requirements for all charities.

As described in Owens' paper, there were important changes within the Internal Revenue Service, notably after passage of the 1969 Act, particularly the establishment of a separate division within the Service under the direction of an Assistant Commissioner for tax exempt and governmental organizations, with personnel trained to understand the separate set of rules applicable to these entities; the establishment of an Advisory Committee to the Assistant Commissioner to bring the views of practitioners and representatives of charities to his attention; and, as noted below, a new provision relating to cooperation with state regulators, namely a requirement that the IRS include in its new reporting forms requests for information helpful to the state regulators.

In 1994, the Commissioner of Internal Revenue, testifying before Congress, requested new legislation that would provide more appropriate sanctions than revocation of exemption for the large universe of publically supported charities. In the following year Treasury proposed and Congress enacted provisions, described as "intermediate sanctions", imposing excise taxes on fiduciaries of publicly supported charities and certain of their donors and their families if they received "excess benefits" from the charity. The restrictions are similar in effect to the self-dealing provisions applicable to private foundations, but somewhat more lenient in that the tax is on the value of the excess benefit rather than on the value of the entire self dealing transaction as is the case with the private foundation tax.

In 2008, the IRS revised Form 990, the annual report for public charities, and instituted a new enforcement effort, aimed at improving the governance practices of charities. This program reflected a new understanding of the importance of state rules governing fiduciary duties. With the changes in Form 990, the IRS also announced that it was preparing to institute electronic filing, mandated by statute in 2006. However, as Owens describes, the exempt organization division of the IRS suffered severe budget cuts, that together with internal constraints stemming from the general operation of the IRS meant that since the start of the 21st century has meant there has been fewer audits and far less guidance in the way of published rulings and revenue procedures than both the regulators and the charities felt adequate for successful regulation.

Critics of existing federal and state regulation have long stressed the need for meaningful cooperation between state officials and the IRS in regard to specific matters under investigation by the IRS. However, the traditional position of the IRS was that it could only provide information to state tax authorities where there were safeguards against disclosure of classified information. The Tax Reform Act of 1969 contained a provision specifically authorizing the IRS to notify state charity regulators with respect to determinations relating to the denial or revocation of tax exemption of charities in their jurisdiction. It was anticipated that this measure would mean that state attorneys general would have information that would help them assure the protection of charitable assets of an organization losing, or failing to gain, exemption. However, Treasury regulations promulgated under this section effectively undermined the statute by interpreting the word "determination" to mean a final determination. This meant that no information could be provided to a state attorney general until all administrative review was

completed, a date at which it would most likely be far too late for the state to take effective action to save the charity's assets.

Legislation to correct this problem was included in the Pension Protection act of 2006, but what was in the bill as finally passes, was a provision that the IRS could not provide information to a state regulatory agency other than its tax department until the state had formally requested it on a specific matter, even though it was unlikely that the state would have knowledge sufficient to make such a request. A third attempt was made to remove the limitation on information sharing in a bill passed in 2007 under which the final determination requirement was removed. For those who thought that meaningful information sharing by the IRS would now be possible, their expectations were misplaced; the IRS interpreted the newest version of the statute as requiring state officials receiving information to acknowledge their potential liability if any federal privacy limitations were violated. Sharing required that the states sign agreements to protect privacy, a requirement that some states were not willing to accept. Thus, again, attempts to improve the nature of the information that can be exchanged were thwarted.

There is another section of the Internal Revenue Code in which cooperation with state regulators was contemplated, that could serve as a model for wider inclusion in the Code. It is section 507(g)(2), enacted as part of the Tax Reform Act of 1969 applicable to private foundations who have incurred liability for violation of any of the private foundation restrictions and there have been either willful repeated acts or failures to act, or a willful and flagrant act giving rise to liability for the excise tax. The penalty prescribed for such a violation is a tax equal to the lower of all of the tax benefits ever received by the foundation since its inception or all of its net assets. Subsection (g) provides for abatement of this confiscatory tax "if following formal notification to an appropriate State Officer within one year, he notifies the Secretary of the Treasury that corrective action has been initiated pursuant to State law to insure that the assets of the foundation involved are preserved for such charitable or other purposes specified in section 501(c)(3)as may be ordered or approved by a court of competent jurisdiction and upon completion of the corrective action, the Secretary receives certification from the appropriate State officer that the action has resulted in the preservation of the foundation's assets.

It does not appear that this section has been used to protect a foundation's assets. However, it is the nature of the provision that is important in that it would be as appropriate in regard to any instance in which the assets of a charity will be subject to what amounts to federal confiscation, as, obviously, if a state attorney general and a state court can succeed in preserving the charity's assets for continued public benefit, that would appear to be a more beneficial outcome. More widespread adoption of such a provision was one of the recommendations of the Panel on the Nonprofit Sector, but otherwise it has not received specific attention in the literature or from the regulators.

In 2006 I published a paper suggesting that it was time to amend the Internal Revenue Code so that private foundations and public charities were treated more alike.[5] Specifically, I suggested that the payout rule might be made applicable to charitable endowments, and that the

[5] Marion R. Fremont-Smith, The Search for Greater Accountability of Nonprofit Organizations: Recent Legal Developments and Proposals for Change, 76 Fordham L. Rev. 609 (2007).

prudent man rule in Chapter 42 should be updated to mesh with the provisions in the Uniform Prudent Management of Institutional Funds Act and made applicable to publicly supported charities, and that the rule regulating taxable expenditures could similarly be extended. These recommendations have not been taken up by others, but the limits on supporting organizations contained in the Pension Protection Act of 2006 indicate that Congress and the Treasury were not reluctant to consider broadening the application of the private foundation rules to one group of public charities. The problem of course is that this legislation created a third class of charities with its own set of limits, instead of simplifying the Code as I had suggested.

During the period I have been describing, there have been important changes within the charitable sector itself designed to improve federal and state regulation. The most important one in terms of assisting both the regulators and the charitable universe, as well potential donors, has been the programs of a charity called GuideStar. This organizations was established in 1994 with the purpose of making charitable giving more efficient by providing easily accessible information on the universe of charities. In 1996 it published the GuideStar Directory of American Charities, as a CD with a printed index that contained copies of the federal reporting forms from 35,000 charities. Later that year it created a website that since then has published information on all charities exempt under section 501(c)(3), taken from the IRS Business Master File. In 1998 and 1999 it began posting forms 990 and 990EZ for all public charities. By 2005, it had included all tax-exempt organizations registered with the IRS. Starting in 2007, it made it possible for donors to make donations from its website, and since then it has increased the amount and nature of information available to the public, notably regarding evaluation of the impact of a charity's activities, its financial status and a compilation of executive compensation. In 2001, New Mexico, without a statute mandating reporting by charities established an on line Charities Research Service with a customized version of the GuideStar database and search engine. In 2004 the California office of the Attorney General adopted a similar service on its website. At the start of 2014, the GuideStar data base included 1.8 million IRS recognized tax-exempt organizations, and 3.2 million digitized Form 990 records.

The importance of the contributions of GuideStar cannot be overstated, as the computer system available to the IRS was not capable of providing this information in the early 2000s and, and as noted above, it has been subject to budget constraints for at least 20 years that have limited its computer capabilities, along with but the number of published rulings and other guidance it has issued.

Developments in both federal and state regulation, particularly those enacted since the start of the 21st century have strengthened and improved the operations of both the IRS and state regulators, even with the financial constraints faced by the regulators. However, in the spring of 2013 the Exempt Organization division came under public scrutiny due to a development not directly related to regulation of charities, but rather to that of a group of organizations exempt from taxation under section 501(c)(4), but not entitled to receive tax deductible contribution. Referred to in the regulations as Civic Leagues and Social Welfare Organizations, these organizations, unlike charities are permitted to conduct unlimited lobbying activities and, a certain amount of political campaign activity, activity that exempt charities may not conduct. Accusations from the Tea Party that the Service had been improperly handling what was an

unusual increase in the number of applications for exemption under section (c)(4), including a large number from local Tea Party chapters and other similar organizations came to the attention of the Congress, with the result that the Acting Commissioner of the IRS and the Assistant Commissioner for Exempt Organizations and Government Entities resigned, and there followed a significant restructuring of the IRS exempt organization division staff. The matter received extensive media coverage and it was unclear at the end of the year what its effect would be on IRS regulation of all tax exempt entities.

Proposals for reforming federal regulation of charities have ranged from improving administration within the IRS, to proposals, such as that of Marcus Owens, to remove the active administration of the Code provisions from the IRS to a separate body with enforcement powers similar to those held by state attorneys general and with equity powers granted to the federal courts to assist in the correction of abuses. In the past I have advocated retaining regulation within the IRS, with adoption of measures that would increase the role of the states in enforcement by melding federal and state powers, and improving administration within the IRS. The revelations in 2013 of the inability of the IRS to manage a major increase in applications for exemption under section 501(c)(4) requires a reassessment of this position, one that I believe is not yet possible for me to do.

IV. THE FUTURE OF STATE AND FEDERAL REGULATION OF CHARITIES.

Having been a very poor prognosticator in regard to state charity regulation during the last 50 or so years, I am reluctant to try again. However, developments in regulation during the period just described, as well as the vast changes afforded by the availability of the internet to disseminate information provide some help while forecasting the future. I have expanded my original assignment to discuss state regulation, as I hope I have made apparent, is my belief that the future of state regulation will be strongly effected by what happens to federal regulation. The use of IRS information in New Mexico and California already demonstrates that a state does not need to maintain a separate registry. With the phase in of the requirement that large charities must use electronic filing, this will make information for state regulators available from both the Service and GuideStar. The exception to this is information relating to solicitation of funds from the public but, as noted below, I do not think this will or should remain one of the principal duties of an attorney general.

I believe it is possible that there will be a new agency, whether governmental or quasi-self-regulatory to enforce federal and state laws governing charities. It is also possible that the federal courts will be granted equity powers to govern charitable activity and charitable fiduciaries. If that does come about, it could well lead to the demise of state regulation, or in any event a great reduction in state activity. My hope is that this will not be the case, as I believe there is great benefit in having a state attorney general and the local courts to formulate the most appropriate resolutions to cases involving protection of charitable assets and prosecution of violations of fiduciary duties. In fact, there will be some residual questions, certainly those involving real property, which will likely require that a state court be involved. I would not predict that it will occur, but I hope that there will be some subsidy from a federal entity to assure the continued involvement of the states in regulation. If that should come about, it would

lead to uniformity among the states in regard to the laws governing charities as well as the nature and extent of regulatory activity.

In regard to regulation of solicitations, although the IRS does request information on its application for exemption and Form 990 as to how funds are raised, it does not have specific powers to regulate solicitations, nor is it suited to do so. However, the burden on charities that raise funds in several or all the states is sufficiently heavy that I believe there will be federal preemption of this aspect of activity by charities. I have suggested in the past and still believe that federal regulation of fundraising fits most rationally within the jurisdiction of the Federal Trade Commission. The Commission already regulates for-profit organizations that hold themselves out as charities, so that it would not be a severe extension of its jurisdiction to entirely unknown entities. Here again, there could be deferral of federal sanctions if a state is taking corrective action to protect charitable assets, but there is no reason why a charity must register in every state while conducting a mail or email solicitation, including a lottery mailing. Although not necessarily in the immediate future, I think it likely that almost all solicitations will be made on the internet and the existing question of when a charity needs to register in a given state, or all 38 that now regulate fund raising, will become moot.

The foregoing predictions presuppose that the charitable sector will continue to grow. However, if the sector should shrink, possibly as a result of reductions of tax incentives or a changes from an income tax to a VAT or consumption tax, there will likely be less federal enforcement as a matter of tax administration. Whether this will mean that federal regulation will be transferred to another existing or new agency is, as I have noted, beyond my power to predict. I do believe, however, that the future role of state regulation will be determined by the course that federal regulation takes, so again I cannot make a prediction in that regard.

A final prediction: unless we as a society can overcome the propensity of some few of our members to steal and of others to take improper advantage of positions given to them as fiduciaries, we will continue to need individuals of the type we are now lucky to have as regulators; individuals dedicated to preserving the integrity of the charitable sector, regardless of where they are situated, what problems they face in imposing sanctions, and what the size of the sector may be.