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# The “Federalization” Problem and Nonprofit Self-Regulation: Some Initial Thoughts

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## INTRODUCTION

Two perhaps contradictory trends are apparent in the regulation and self-regulation of the nonprofit sector. First, as this symposium’s call for papers indicated, “federalization” of nonprofit regulation is increasing. There are multiple examples, several mentioned in the call for papers: The Internal Revenue Service’s (IRS) issuance of a new IRS Form 990 that goes beyond information required earlier;<sup>2</sup> federal (particularly congressional) scrutiny of “many non-tax aspects of hospital operations”; and the intensive federal attention to foundation risk procedures and internal governance matters in the so-called voluntary guidelines applicable to overseas grant makers in the wake of the September 11 attacks. In a recent article, Lloyd Mayer and Brendan Wilson noted that “[m]embers of Congress, congressional staff, and . . . Internal Revenue Service officials have . . . called for an expanded federal role” in nonprofit regulation, citing the staff of the Senate Finance Committee, government officials, and academic commentators on the issue.<sup>3</sup>

Counterbalancing those increasing calls for “federalization” is the growth of self-regulation. Increased regulation and federalization of

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<sup>2</sup> IRS, FORM 990 (2010).

<sup>3</sup> Lloyd Hitoshi Mayer & Brendan M. Wilson, *Regulating Charities in the Twenty-First Century: An Institutional Choice Analysis*, 85 CHI.-KENT L. REV. 479, 479 (2010). For a skeptical view, see James J. Fishman, *Stealth Preemption: The IRS’s Nonprofit Corporate Governance Initiative*, 29 VA. TAX REV. 545 (2010).

the regulation of nonprofits is being matched by the development and spread of nonprofit self-regulation, perhaps more quickly than some of self-regulation's persistent critics might have imagined. In recent years, for example, we have seen the emergence, after careful work and much consultation, of the *Principles for Good Governance and Ethical Practice: A Guide for Charities and Foundations*. The *Principles* are by far the most detailed and substantive attempt at self-regulation of the broad charitable and philanthropic sector since Independent Sector and others began these multiple efforts in the 1970s.<sup>4</sup> And we have seen the development of successful self-regulatory programs in a number of nonprofit sub-sectors, such as land trusts,<sup>5</sup> successful quality enhancement self-regulatory efforts in many states,<sup>6</sup> and strengthened quality enhancement self-regulatory efforts in the community foundation area. In the philanthropic arena, while self-regulation of private foundations remains very weak, the situation has changed considerably in the community foundation field.<sup>7</sup> For a number of years, the range, scope, and impact of the *National Standards for U.S. Community Foundations* has been growing in surprisingly effective ways.<sup>8</sup> More than 450 of the 700 community foundations in the United States

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4 See PANEL ON THE NONPROFIT SECTOR, INDEPENDENT SECTOR, PRINCIPLES FOR GOOD GOVERNANCE AND ETHICAL PRACTICE: A GUIDE FOR CHARITIES AND FOUNDATIONS, (2007), available at [http://www.nonprofitpanel.org/report/principles/principles\\_guide.pdf](http://www.nonprofitpanel.org/report/principles/principles_guide.pdf). For the earlier efforts, see, e.g., Robert O. Bothwell, *Trends in Self-Regulation and Transparency of Nonprofit Organizations in the U.S.*, 4 INT'L J. NOT-FOR-PROFIT L. no. 1, Sept. 2001, [http://www.icnl.org/knowledge/ijnl/vol4iss1/art\\_1.htm](http://www.icnl.org/knowledge/ijnl/vol4iss1/art_1.htm); INDEPENDENT SECTOR, OBEDIENCE TO THE UNENFORCEABLE: ETHICS AND THE NATION'S VOLUNTARY AND PHILANTHROPIC COMMUNITY (1991), available at [www.aahsa.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=3572](http://www.aahsa.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=3572).

5 For information on the work of the Land Trust Accreditation Commission and the Land Trust Standards and Practices, see *Accreditation*, LAND TRUST ALLIANCE, <http://www.landtrustalliance.org/training/accreditation> (last visited Mar. 8, 2011); see also Tamara Van Ryn, *Self-Regulation in the Nonprofit Sector: Land Trusts as a Case Study*, VT. LAW SCH. PODCASTS (June 29, 2006), <http://vlspodcasts.wordpress.com/2007/07/05/self-regulation-in-the-nonprofit-sector-land-trusts-as-a-case-study/>.

6 See, e.g., IOWA GOVERNOR'S NONPROFIT TASK FORCE, IOWA PRINCIPLES AND PRACTICES FOR CHARITABLE NONPROFIT EXCELLENCE (rev. ed. 2008), <http://www.sos.state.ia.us/pdfs/Nonprofits/IAPP4CNE.pdf>; MINN. COUNCIL OF NONPROFITS, PRINCIPLES & PRACTICES FOR NONPROFIT EXCELLENCE (2010), [http://www.minnesotanonprofits.org/Principles\\_Practices.pdf](http://www.minnesotanonprofits.org/Principles_Practices.pdf).

7 The only significant self-regulatory mechanism available in the philanthropic arena is the National Standards for U.S. Community Foundations administered by the Council on Foundations. See *About National Standards*, CMTY. FOUNDS. NAT'L STANDARDS BD., [http://www.cfstandards.org/About\\_us/about\\_us.asp](http://www.cfstandards.org/About_us/about_us.asp) (last visited Mar. 8, 2011). Although there have been efforts to establish standards for private foundations, these are weak and largely unenforced. See, e.g., *The Council, Getty, and the Limits of Self-Regulation*, NAT'L COMM. FOR RESPONSIVE PHILANTHROPY (Dec. 23, 2005), <http://blog.ncrp.org/2005/12/council-getty-and-limits-of-self.html>.

8 See COUNCIL ON FOUNDS., NATIONAL STANDARDS FOR U.S. COMMUNITY FOUNDATIONS (2004), available at [http://www.cof.org/files/Documents/Community\\_Foundations/National\\_Standards/NationalStandards.pdf](http://www.cof.org/files/Documents/Community_Foundations/National_Standards/NationalStandards.pdf).

have self-confirmed their compliance with the Standards, and at least 70 more are working on compliance—a compliance rate for non-mandatory self-regulation requiring extensive reporting and internal discussion of standards that would be the envy of most industries.<sup>9</sup>

So, what happens when increasing, though fragmented, aspects of the “federalization” of nonprofit law meet the growth of nonprofit and philanthropic self-regulation? Is there any reason to think that we may, or should, be moving toward increased “federalization” of nonprofit self-regulation or that federalizing impulses are affecting the development of self-regulation? What are some of the implications and challenges of increasing self-regulation for government regulation (and particularly increased federalization of that regulation) in the nonprofit sector? This introductory foray into the question of any potential “federalization” of nonprofit self-regulation contains more questions than answers for the future of this area of the law. These are merely some initial thoughts on a topic likely to gather more attention in the years ahead.

#### I. “FEDERALIZING” NONPROFIT SELF-REGULATION: MANY MEANINGS

“Federalization” can take many forms, as the contributors to this symposium acknowledge and discuss, and any thinking about “federalizing” nonprofit regulation or self-regulation needs to be broadly gauged as well. The narrowest of these notions is actual takeover, by national regulation, of functions currently handled in other ways. The most common of these “takeover” forms of “federalization,” discussed in several other papers in this symposium, is either the creeping or explicit expansion of federal regulation into areas traditionally regulated by the states—a kind of reverse regulatory devolution. But I start here with much broader notions of “federalization,” particularly when it comes to the question of positive regulation and self-regulation in the nonprofit context.

One broader idea of “federalization” that seems worth discussing in the nonprofit self-regulation context is the idea of attempts by Congress and the executive branch to encourage stricter nonprofit self-regulation and, especially, to influence the nonprofit sector’s choice of self-regulatory models and providers. That is the idea of “federalization” as a mandate for self-regulation, and even as the potential choice of self-regulatory providers and arbiters.

One fairly recent example of such an attempt to put a kind of “federalizing” thumb on the scale of nonprofit self-regulation was the widely-circulated written recommendation by the staff of the Senate Finance Committee to preference a particular self-regulatory model and provider, and to provide that organization with funding. Although

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<sup>9</sup> *About National Standards*, *supra* note 7. Data is as of April 2009 and is almost certainly higher now.

ultimately unsuccessful, the Senate staff suggested that funds be provided for self-regulation efforts—itsself an interesting step toward “federalization” of nonprofit self-regulation. But, more important for our purposes, the Senate staff draft explicitly endorsed the approach taken in Maryland (and now nationally) by the Standards of Excellence project, one of a number of ethics and accountability codes and programs now available for the nonprofit sector through what I have elsewhere called—and not always positively—“associational entrepreneurs.”<sup>10</sup>

The Senate staff draft suggested that the IRS contract with non-governmental self-regulatory organizations and endorsed the notion that the IRS directly condition “charitable status” or “authority of a charity to accept charitable donations” on accreditation.<sup>11</sup> This may have been among the first discussions of direct federal incentives for nonprofit self-regulation. The Finance Committee staff recommended:

There would be an authorization of \$10 million to the IRS to support accreditation of charities nationwide, in States, as well as accreditation of charities of particular classes (e.g. private foundations, land conservation groups, etc.). The IRS can initiate its own accreditation efforts as well as solicit requests. Priority would be given to proposals with matching dollars. The IRS would have the authority to contract with tax exempt organizations that would create and manage an accreditation program to establish best practices . . . and review organizations on an ongoing basis for compliance. Such organizations could require dues by members to meet costs; and contract authority to review member information and take corrective action. The IRS would have the authority to base charitable status or authority of a charity to accept charitable donations on whether an organization is accredited. The proposal should encourage accreditation that is already taking place at the state level (e.g. Maryland, Ohio, Pennsylvania, Georgia and Louisiana) or in particular classes (nonprofit hospitals, zoos and universities already subject to accreditation).<sup>12</sup>

The Staff Discussion Draft explicitly cited the standards promulgated by and through the efforts of the Maryland Standards for Excellence Institute, and directly cited the work of that particular associational entrepreneur.<sup>13</sup> And the staff draft went further, calling for a broader program of alliance and incentives with self-regulators through

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<sup>10</sup> Mark Sidel, *The Guardians Guarding Themselves: A Comparative Perspective on Nonprofit Self-Regulation*, 80 CHI.-KENT L. REV. 803, 811-12 (2005).

<sup>11</sup> STAFF OF S. COMM. ON FIN., 108TH CONG., STAFF DISCUSSION DRAFT 14 (Comm. Print 2004) [hereinafter STAFF DISCUSSION DRAFT], available at <http://finance.senate.gov/imo/media/doc/062204stfdis.pdf>. For an initial response from the nonprofit community to this proposal, see PANEL ON THE NONPROFIT SECTOR, INDEPENDENT SECTOR, INTERIM REPORT PRESENTED TO THE SENATE FINANCE COMMITTEE (2005), available at <http://www.nonprofitpanel.org/about/interim/PanelReport.pdf>.

<sup>12</sup> STAFF DISCUSSION DRAFT, *supra* note 11, at 14-15 (citations omitted).

<sup>13</sup> *Id.*

[f]unding of \$25 million for nonprofit exempt organizations that educate other tax exempt organizations on best practices and inform the public of charities that are engaged in best practices; such funds would be provided to State organizations as well as national organizations to ensure an education presence in each state; a priority would be given to organizations that assist small charities in meeting proper standards and accreditation.<sup>14</sup>

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

Note, in particular, how far that informal proposal went: “The IRS can initiate its own accreditation efforts as well as solicit requests. . . . The IRS would have the authority to base charitable status or authority of a charity to accept charitable donations on whether an organization is accredited.”<sup>15</sup> This is (or would have been) true “federalization,” either through “the IRS . . . initiat[ing] its own accreditation efforts” (presumably through intermediaries), or “bas[ing] charitable status or authority of a charity to accept charitable donations on . . . accredit[ation].” Either is truly extensive, and neither has been fully discussed in the American context.

Another element of “federalization,” related to the “accreditation” notion above, is the potential use of nonprofit self-regulation by the federal government. This is occurring in some other industries, as indicated below. And here we have more questions than answers at present. Are legislators and executive agency personnel using the multiplying forms of nonprofit self-regulation to gather data and make the case for new forms of regulation, new forms of information gathering, or other legislative or executive activities? Are the federal legislative and executive branches learning anything useful from the new nonprofit self-regulation to expand their federalization activities? Or perhaps, in some cases, will they decide not to compete with the expansion of self-regulation?

A third question about any potential notions of “federalization” of nonprofit self-regulation is whether more regulation means less self-regulation. Here too research questions outstrip the data currently available from actual practice. Will we see less acceptance or compliance with non-mandatory forms of nonprofit self-regulation as mandatory federal regulation and reporting requirements increase? At least initially, this does

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<sup>14</sup> *Id.* at 15.

<sup>15</sup> *Id.* at 14 (citations omitted).

not appear to be the case. For example, the revised and strengthened Form 990 has been issued at the same time as some in the sector seek to spread compliance with the Panel on the Nonprofit Sector's relatively new (2007) *Principles for Good Governance and Ethical Practice: A Guide for Charities and Foundations*, as well sub-sectoral self-regulatory mechanisms, state self-regulatory principles, and other efforts. It does not appear, from recent events, that we are seeing a decline in acceptance or compliance with non-mandatory forms of nonprofit self-regulation as mandatory federal regulation and reporting requirements increase. Rather, it begins to appear that the two trends are mutually reinforcing each other—that the revised and more detailed regulatory and reporting requirements are both encouraging and, perhaps indirectly, resulting from greater self-regulatory efforts.

We have little data so far on how nonprofits are responding to this seemingly side-by-side, silo-ized increase in both federal regulatory requirements (through the Form 990) and encouragement from multiple sides to comply with self-regulatory requirements. But many questions will need to be addressed in this area. Will nonprofit boards and staff decide that the requirements of the new Form 990, along with limited time, staff, and resources, trump and de-prioritize efforts to comply with the new *Principles for Good Governance and Ethical Practice* and other state and sectoral self-regulatory mechanisms? Or will organizations decide that the attention that must be paid to the governance and other new aspects of the Form 990 makes consideration and compliance with the *Principles* and other self-regulation codes, as well as sub-sectoral codes and practices, both more important and easier and simpler to undertake? And, as appears likely, will these multiple obligations merely increase the burdens on nonprofits, especially smaller and grassroots organizations?<sup>16</sup>

## II. THE REGULATORY USES OF SELF-REGULATION: EXAMPLES FROM OTHER FIELDS

The very preliminary questions I am raising on notions of “federalization” of self-regulation may be new to the nonprofit and philanthropic arena, but aspects of this inquiry have been explored in other fields.

In the securities field, for example, scholars began to ask whether the federal government is in effect “federalizing” securities self-regulation either by adopting its mechanisms or by spurring more federal regulation in the absence of effective self-regulation, even before the crisis of 2008-

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<sup>16</sup> My colleague Willard Boyd has forcefully raised these concerns in multiple fora, including the deliberations of the Advisory Committee on Self-Regulation of the Charitable Sector, Panel on the Nonprofit Sector convened by Independent Sector that produced the *PRINCIPLES FOR GOOD GOVERNANCE AND ETHICAL PRACTICE: A GUIDE FOR CHARITIES AND FOUNDATIONS*.

2009 that spurred further discussion of these issues.<sup>17</sup> Administrative law scholars have begun to explore whether federal agencies are increasing the utilization of self-regulatory tools and results in their regulatory actions.<sup>18</sup> In other fields—organic food certification, the accreditation of higher education, online marketing and privacy issues, the self-regulation of credit rating agencies, enforced self-regulation in the securities industry, and (in California) video game ratings—federal and occasionally state governments have partly adopted or sought to strengthen self-regulatory initiatives that come from industry.

One form of regulation that has been frequently used in other fields is often termed “delegated regulation” or “audited self-regulation.” In these situations, a federal agency may delegate certain quasi-regulatory tasks to a non-government group of some kind—tasks that could include gathering data, examining information provided, checking on compliance, and other work. Enforcement may occur through the self-regulatory industry group, but often that power is held in the delegating governmental agency.

In the case of *credit rating agencies*, for example, a form of self-regulation eventually moved toward formal regulation of a sector. Credit rating agencies were largely self-regulated until recently, but the Securities and Exchange Commission (SEC) now relies on credit rating agencies to rate the creditworthiness of certain financial products, and in the wake of Enron, there was a sense that they had failed in their work. In 2007, under the Credit Rating Agency Act, the SEC required credit rating agencies that were seeking registration as nationally recognized statistical rating organizations (“NRSROs”) to follow defined procedures, retain certain records, file annual financial reports, implement written policies and procedures to prevent the misuse of material nonpublic information, and disclose conflicts of interest. NRSROs are also prohibited from engaging in unfair, coercive, or abusive practices.<sup>19</sup>

In the case of *organic food certification*, in 2002 the U.S. Department of Agriculture (USDA) adopted organic standards in its National Organic Program based on the many independent standards that developed from the 1970s through the 1990s (for example, self-regulatory certification of organic farms began with California Certified Organic Farmers in 1973).<sup>20</sup> Under this program, certification is still performed by private and state

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17 See, e.g., Onnig H. Dombalagian, *Self and Self-Regulation: Resolving the SRO Identity Crisis*, 1 BROOK. J. CORP. FIN. & COM. L. 317, 324 (2007).

18 See, e.g., Douglas C. Michael, *Federal Agency Use of Audited Self-Regulation as a Regulatory Technique*, 47 ADMIN. L. REV. 171, 173-74 (1995).

19 See Credit Rating Agency Reform Act of 2006, Pub. L. No. 109-291, 120 Stat. 1327 (codified as amended in scattered sections of 12, 15, and 20 U.S.C. (2006)).

20 About CCOF, CALIFORNIA CERTIFIED ORGANIC FARMERS, <http://www.ccof.org/about.php> (last visited April 3, 2011).

agencies, making this a form of delegated regulation, at least in the case of the private associational certifiers.<sup>21</sup>

*Higher education and its accreditation standards* are a well-known form of delegated regulation (including in the law school arena). Congress has adopted standards that higher educational institutions are required to satisfy before they qualify as providers or recipients of federal financial aid, but the measurement and implementation of those standards is usually delegated to a number of national and regional non-governmental accrediting bodies. By congressional action, the Secretary of Education must release a list of recognized accreditation agencies deemed reliable to evaluate the educational quality provided by colleges and universities.<sup>22</sup>

The *marketing of prescription drugs and medical devices* is another form of delegated regulation to industry. In very general terms, the prescription drug and medical device industries pay “user fees” to fund traditional public regulation. But the prescription drug industry is encouraged to police itself by reporting violations of the “Bad Ad” program to the Division of Drug Marketing, Advertising, and Communications in the Food and Drug Administration’s Center for Drug Evaluation and Research for enforcement under federal regulation.<sup>23</sup>

Attempts are underway to “federalize” some aspects of the hitherto self-regulated *online marketing privacy standards*. Proposed legislation would require online publishers, advertising firms, and other industry groups that use private data to strengthen their notice to consumers of the use of online consumer data. The enhanced requirements would be based on the Fair Information Practices and the Network Advertising Initiative Principles developed by user groups. So far, “the draft appears to be inspired by the very approaches online publishers, ad firms, and industry groups have employed in their own self-regulatory efforts.”<sup>24</sup>

Finally—although there are other examples of “delegated regulation” and other intersections between governmental regulation and self-regulation—at least one commentator has proposed that the strong link between regulators and self-regulators in the *securities industry*, and the powerful role of the National Association of Securities Dealers, be adapted

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21 See Organic Foods Production Act of 1990, 7 U.S.C. §§ 6501-6523 (2006) (requiring the USDA to establish organic standards). Standards are laid out in 7 C.F.R. § 205 (2010).

22 See Higher Education Act of 1965, 20 U.S.C. § 1099b (2006). The standards for recognizing accrediting agencies are laid out in 34 C.F.R. § 602.1-.5 (2011).

23 See *Truthful Prescription Drug Advertising and Promotion (Bad Ad Program)*, FDA, <http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Surveillance/DrugMarketingAdvertisingandCommunications/ucm209384.htm> (last updated Mar. 17, 2011).

24 Kate Kaye, *Privacy Bill Mimics Industry Self-Regulation*, CLICKZ (May 4, 2010), <http://www.clickz.com/clickz/news/1711605/privacy-bill-mimics-industry-self-regulation>; see STAFF DISCUSSION DRAFT, 111th Cong. (2010), <http://stearns.house.gov/News/DocumentSingle.aspx?DocumentID=183894>.

for the nonprofit or more limited philanthropic context.<sup>25</sup> The notion here, as in many of the initiatives involving self-regulatory groups, is that the self-regulators already possess significant power, that more regulation in federal (or state) hands is either inappropriate or unnecessary, and that linking or delegating certain functions to private, self-regulatory groups makes sense.

These diverse industry examples may begin to indicate that two key models in the relationship between industry self-regulation and governmental regulation have emerged, at least in some fields. One is the “takeover” model, in which self-regulatory norms eventually become direct regulatory mandates. Another is the “delegated regulation” model, in which government ties its regulation directly to self-regulatory tasks being carried out by powerful industry self-regulators, and relies on self-regulatory standard compliance, monitoring, and other tasks implemented by self-regulators.

Currently, at least to my knowledge, we see little evidence of these models emerging into reality in the American nonprofit and philanthropic arena. We have not yet seen situations in which self-regulatory norms eventually become direct regulatory mandates in the “takeover” scenario. Nor do we see formal kinds of “delegated regulation,” in which the IRS or other agencies tie their regulatory activities to self-regulatory tasks being carried out by nonprofit self-regulators (or would-be, or even reluctant self-regulators), such as the Council on Foundations, Independent Sector, sectoral trade and monitoring groups (such as the Land Trust Alliance), state nonprofit associations that work with state principles and codes, and other self-regulatory or standard-setting groups. In the philanthropic arena, where one commentator has called for the adoption of the strong self-regulatory model used in the securities industry and relied upon by federal authorities,<sup>26</sup> there appears no realistic prospect for any meaningful link between federal (or state) regulation and self-regulation other than foundation adherence to the relevant state-level principles and practices for charitable excellence documents. The result in that important area includes regular calls for great federal regulation and enforcement, regular push-back by the private philanthropic industry, and virtually non-existent self-regulation except for the impressive gains in the community foundation arena through the National Standards for Community Foundations.

### III. DELEGATED REGULATION IN THE NONPROFIT ARENA: AN EXAMPLE FROM NONPROFIT SELF-REGULATION ABROAD

Outside the United States, nonprofit self-regulation takes on many forms, creating a fascinating diversity and pluralism in approaches to

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<sup>25</sup> JOEL FLEISHMAN, *THE FOUNDATION: A GREAT AMERICAN SECRET* 250-51, 259-60 (2007).

<sup>26</sup> *Id.* at 258-59.

accountability at the national level. And, in a few countries, the question of the relationship between growing nonprofit self-regulation and government regulation has begun to come under more intensive discussion.

In Asia, where some of my work on this issue has focused,<sup>27</sup> there have been many motivations for self-regulation to emerge and, as a result, often multiple systems emerging within individual countries. These multiple motivations for self-regulation include enhancing the collective reputation of the sector, avoiding strengthened government regulation, obtaining the benefits of allying strategically with government, using self-regulation to eliminate nonprofit competitors, taking advantage of entrepreneurial opportunities for self-regulation facilitators, and marginalizing low-quality actors.<sup>28</sup>

The diverse motivations for collective action can thus lead in different directions for self-regulation. They certainly have in Asia. And, in turn, different relationships with “federal” or national government authorities have developed. In several countries of Asia, the key self-regulatory initiatives have capitalized and drawn strength from a decision by government to delegate nonprofit tax status determination to nonprofit self-regulators, giving the self-regulatory bodies a key role in the regulatory process. The process is most advanced in the Philippines, where a form of “delegated regulation” to a self-regulatory, certification body has been in place since the 1990s. In effect, the Philippines has adopted one form of “federalized” nonprofit self-regulation.

The Philippines has the single most well-known experience in nonprofit self-regulation anywhere in Asia—in particular, the successful but complex story of the Philippine Council for NGO Certification (PCNC). The PCNC and its certification process are the result of direct cooperation with government, backed up by government reliance on that certification process to issue tax exemptions to nonprofit organizations. The concern with nonprofit accountability in the Philippines, and a willingness to use self-regulation to address it, goes back at least as far as the inauguration of the Corazon Aquino government in 1986. At that time, a number of nonprofit leaders joined the Aquino administration in one of the earliest and most prominent forms of friendly alliance between the state and the voluntary sector in Asia. In the early 1990s, the Philippine government suggested a nonprofit certification mechanism and government–nonprofit cooperation as the primary method for determining nonprofit “donee institution status”—the tax status that confers deductibility for donations,

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<sup>27</sup> See, e.g., Mark Sidel, *The Promise and Limits of Collective Action for Nonprofit Self-Regulation: Evidence from Asia*, 39 *NONPROFIT & VOLUNTARY SECTOR Q.* 1039 (2010); see also Sidel, *supra* note 10.

<sup>28</sup> See Mary Kay Gugerty, Mark Sidel & Angela L. Bies, Introduction to Minisymposium, *Nonprofit Self-Regulation in Comparative Perspective—Themes and Debates*, 39 *NONPROFIT & VOLUNTARY SECTOR Q.* 1027, 1032 (2010); see also Sidel, *supra* note 27, at 1040.

providing direct government backing for a form of nonprofit certification and self-regulation.<sup>29</sup>

The idea for government–nonprofit collaboration in a delegated self-regulation process that would result in government determinations of nonprofit tax status matured into the PCNC, which was founded in 1998 and assigned the task of certifying nonprofits for donee institution status under the Philippine tax code. The crucial role of the PCNC in this process and in raising standards in the sector arises out of an agreement with government for the nonprofit sector to play a significant role in a traditional government responsibility—the granting of nonprofit tax status. In this way, a portion of the Philippine nonprofit sector took charge of its own certification process for nonprofit tax status, expanding that intensive examination and certification process to include a “Seal of Good Housekeeping” for nonprofit organizations.<sup>30</sup>

PCNC has certified more than 1,000 organizations thus far, with more in the pipeline. And its goals have broadened as well: Today, the PCNC certification process is “not only [intended] to pursue tax incentives for donors to NGOs but also, and even more importantly, to promote professionalism, accountability, and transparency among [NGO network] members, and the Philippine non-profit sector.”<sup>31</sup> PCNC pursues these goals in a variety of ways: through the tax certification process, by evaluating nonprofits for a “Seal of Good Housekeeping,” through capacity-building mechanisms, by involving nonprofit personnel as peer evaluators and capacity builders, by speaking for the sector and for nonprofit self-regulation, and by other means.<sup>32</sup>

The PCNC government-supported model has been discussed throughout Asia by nonprofit networks and governments interested in self-regulation and certification. PCNC’s intensive certification model may be most usefully applicable around Asia when government–nonprofit relations are close enough for substantive cooperation, and the government has

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<sup>29</sup> For more information on the PCNC, see PHILIPPINE COUNCIL FOR NGO CERTIFICATION (PCNC), <http://www.pcnc.com.ph/> (last visited Mar. 11, 2011). For earlier discussions of the Philippine experience, see Sidel, *supra* note 10; MARK SIDEL, TRENDS IN NONPROFIT SELF-REGULATION IN THE ASIA PACIFIC REGION: INITIAL DATA ON INITIATIVES, EXPERIMENTS AND MODELS IN SEVENTEEN COUNTRIES (2003), available at <http://zunia.org/uploads/media/knowledge/marksegal.pdf> (report prepared for the Asia Pacific Philanthropy Consortium (APPC) Conference on Governance, Organizational Effectiveness and the Non-Profit Sector held in Manila in Sept. 2003).

<sup>30</sup> *Background and Rationale*, PHILIPPINE COUNCIL FOR NGO CERTIFICATION, <http://www.pcnc.com.ph/background-a-rationale.html> (last visited Mar. 11, 2011).

<sup>31</sup> *Id.*

<sup>32</sup> *Certification of Non-Stock, Non-Profit Corporations and Non-Government Organizations for Donee Institution Status*, PHILIPPINE COUNCIL FOR NGO CERTIFICATION, <http://www.pcnc.com.ph/certification-of-non-stock-non-profit-corporations-and-ngos-for-donee-institution-status.html> (last visited Mar. 11, 2011).

directly sought voluntary sector assistance in fulfilling regulatory goals. In the Philippines' case, the regulatory goal sought by the government was assistance in certification for tax exemption. That merging of goals through an intensive certification process also helps solve the problem of financial sustainability that plagues discussions of most other certification and accreditation models around Asia and well beyond. Organizations are far more likely to pay for certification or other forms of self-regulation when it is tied to a valuable government regulatory benefit, such as tax incentives.

The PCNC certification model is not the only nonprofit self-regulation initiative in the Philippines. As in other countries, the interplay between PCNC certification and other self-regulatory mechanisms is complex, particularly where several self-regulatory processes or structures may apply to individual organizations. In the Philippines, in recent years, the voluntary sector has made progress in resolving these overlapping requirements, often with the result that the PCNC certification process has been strengthened as a core self-regulatory mechanism, a form of collective action that has become considerably broader and more secure over time.

For example, the Code of Conduct for Development NGOs, created by the Caucus of Development NGOs (Code-NGO) in the 1990s, was developed into the Code of Conduct and became the *Code-NGO Covenant on Philippine Development*. Part III of the *Code-NGO Covenant*, Responsibilities of Development Non-Government Organizations, is generally referred to as the "Code of Conduct." In the late 1990s and early 2000s, Code-NGO and its members faced questions about the overlapping nature of the PCNC certification process and adherence to the Code of Conduct. In 2003, Code-NGO—a core partner in the PCNC enterprise—sought to resolve these complexities by making adherence to the Code consistent with PCNC certification. Code-NGO "passed a landmark resolution that advocates [for PCNC] certification of its members . . . [as] the primary strateg[y] for promoting transparency and accountability within [its] ranks."<sup>33</sup> Code-NGO resolved to maximize a mechanism that already existed—the PCNC—rather than expending considerable effort and resources developing and implementing a separate monitoring system.<sup>34</sup>

There are multiple additional nonprofit self-regulatory mechanisms in the Philippines that apply to particular subsectors of the voluntary sector. But in some of these cases, as well, intensive efforts are underway to harmonize sub-sectoral self-regulatory requirements with PCNC certification. The Philippine Association of Foundations, for example, has its own Code of Ethics to which it requires adherence by members, but it

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<sup>33</sup> *Internal Reform Initiatives*, CODE-NGO, <http://www.code-ngo.org/home> (roll over "Programs," then "Membership Development," and follow "Internal Reform Initiatives" hyperlink) (last visited Mar. 11, 2011).

<sup>34</sup> *Id.*

was also certified by PCNC in 2004. In turn, this organization encourages its members to seek PCNC certification as a “top priority.”<sup>35</sup>

The “delegated regulation” aspects of the Philippine PCNC process itself—one of the more successful nonprofit self-regulatory efforts anywhere in Asia—have not been enough to insulate PCNC from attempts by governmental agencies to usurp its special role. Indeed, the special role of PCNC and its certification process in government tax status determinations have helped to spur bureaucratic warfare against this merged model of delegated self-regulation.

In 2007, for example—illustrating the continuing complexities of nonprofit self-regulation in the Philippines—PCNC and its certification process for donee institution tax status came under direct attack from a key government agency. The Philippine Department of Social Welfare and Development drafted and obtained the signature of the Philippine President on an Executive Order that divested PCNC of its role in determining nonprofit tax status and clawed back that authority to government, threatening, at least temporarily, to dissolve nearly a decade of close government–nonprofit collaboration on nonprofit certification. In November 2007, PCNC responded with a letter to Philippine President Arroyo seeking recall or repeal of the Executive Order and a return to its previous role in accrediting nonprofit tax status. The following January, the president’s office suspended enforcement of the Executive Order, returning the situation to its previous state and reinstating the core role of self-regulatory certification in the tax status process.<sup>36</sup>

The PCNC “model” has become famous elsewhere in Asia and beyond, but its applicability elsewhere has often been overstated because it relies on the delegated regulation model in which the government, in effect, delegates tax status determinations to PCNC certification decisions. That linkage between government regulation of the sector and self-regulatory processes currently appears in few other countries of Asia or elsewhere, though it has sparked much discussion, sometimes mixed with envy for the

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35 *PCNC Certification for Members Still Top AF Priority*, ASSOC. OF FOUNDATIONS, <http://af.pfonline.org/news37.htm> (last visited Mar. 11, 2011).

36 Sidel, *supra* note 27, at 1055 n.27; *see also* Establishment of a Government–Nongovernment Partnership in the Accreditation of Donee Institutions Relative to the Tax Deductibility of Charitable Contributions Under Section 34(H) of the National Internal Revenue Code, As Amended, Exec. Ord. No. 720 (2008), O.G., p. 5500 (Phil.), *available at* <http://elibrary.judiciary.gov.ph/index10.php?doctype=Executive%20Orders&docid=1216349210124458644>; Designating Appropriate Government Agencies to be the Accrediting Entities that Will Certify and Accredite Charitable Organizations as Donee-Institutions Relative to the Deductibility of Contributions or Gifts Received by Them, in Relation to Section 34 of the Tax Reform Act of 1997, Exec. Ord. No. 671 (2007), O.G., p. 690 (Phil.), *available at* [http://www.iccs1.org/pubs/12-13\\_EO\\_671.pdf](http://www.iccs1.org/pubs/12-13_EO_671.pdf); Letter from Board of Trustees, Phil. Council for NGO Certification, to Madame Gloria Macapagal Arroyo, President, Republic of the Phil. (Nov. 19, 2007), *available at* [http://www.icnl.org/knowledge/news/2007/12-13\\_Repeal\\_Letter.pdf](http://www.icnl.org/knowledge/news/2007/12-13_Repeal_Letter.pdf).

strong role of self-regulatory certification processes in the Philippines.<sup>37</sup> Yet the Philippines' situation remains an interesting comparative case in which government regulation and self-regulatory processes have come together in ways that have served both governmental and sectoral interests—a “win-win” situation. In the Philippines, the government has greater confidence in sectoral accountability and in the quality of decision-making on charitable tax determinations. For the sector, self-regulation has been legitimized and strengthened through its linkage to a key government decision on tax status; “federalization” has strengthened self-regulation.

#### IV. REDUCING UNNECESSARY BURDENS OF SELF-REGULATION

In the United States, the efforts by the Independent Sector Advisory Committee on Self-Regulation of the Charitable Sector to devise an implementable set of principles for nonprofit self-regulation encountered problems similar to those in the Philippines. Most of the nonprofits to which the Advisory Committee's principles apply are already governed by self-regulatory norms within functional areas of work (i.e., associational standards and accreditation), federal standards, and state standards (both self-regulatory and regulatory). In the United States, we have not made much progress in reducing these increasing burdens on nonprofits, especially smaller and grassroots organizations—and I would say that they are continuing to increase.

At the state level, where there is detailed understanding of the burdens on smaller and grassroots organizations, these concerns about overlapping government and self-regulation are taken seriously, and in some cases acted upon. In at least one state, where a state-level “principles and practices” document has been circulated for adherence by nonprofit organizations in that state, the drafters were careful to try to minimize creating additional burdens on smaller nonprofits.

In Iowa, the drafters of the state-level *Iowa Principles and Practices for Charitable Nonprofit Excellence* (“*Principles and Practices*”) provided broadly for multiple ways to meet the *Principles and Practices*, in an attempt to avoid unnecessary burdens on organizations in complying with multiple standards and to recognize the work that many groups had already done. An organization can comply with the *Principles and Practices* by having its board adopt the *Principles and Practices* by resolution or by training its staff in the *Principles and Practices* or through licensure or accreditation. If an organization is accredited by a national organization or licensed by a state agency, it will be “presumed to have significantly complied” with the *Principles and Practices*.

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<sup>37</sup> In Asia, there have been moves toward linking government regulation and self-regulatory processes in Pakistan, and discussions in India.

The *Principles and Practices* go on to make clear the breadth of the drafters' commitment to reducing these multiple, or silo-ized, burdens on local organizations. Compliance under the *Principles and Practices* can be achieved through the sectoral regulation provided by “accreditation systems for educational institutions, health organizations, and libraries” as well as the accreditation or certification offered by United Way, Goodwill, Girl Scouts of the USA and the Boy Scouts of America, the Salvation Army, the American Red Cross, the National Council for Private School Accreditation, the Commission on Accreditation of Rehabilitation Facilities, the Continuing Care Accreditation Commission, the American Association of Museums, the State Library of Iowa, and the Joint Commission on Accreditation of Health Care Organizations (now known as Joint Commission). The multiple forms of state agency licenses are also cited as counting for compliance, including license processes for adult day services programs, animal shelters, assisted living programs, child care centers, child foster care, child placement agencies, elder group homes, nursing facilities, and substance abuse programs.<sup>38</sup>

#### CONCLUSION

It may well be that the “federalization” of nonprofit self-regulation is not on the agenda in the United States, despite models from other industry fields, recommendations in the philanthropic context, and other discussions that might lead in that direction. Even some of the “federalizers” themselves eschew the “federalization” of self-regulation or delegated self-regulation as an effective mechanism for a stronger federal role. For example, Mayer and Wilson quote a senior IRS official indicating:

[s]ome have argued that we do not need to be involved, because we can count on the states to do their job and the sector to stay on the path of self-regulation. While both state regulation and sector self-regulation are important . . . we cannot delegate to others our obligation to enforce the conditions of federal tax exemption.<sup>39</sup>

Thus, some “federalizers” may, when faced with the prospect of integrating their work more closely with increasing sectoral self-regulation, view such a development as a distraction or a loss of federal power rather than as a benefit for stricter and more effective regulation.

Increasingly, we appear to be observing distinct, parallel paths—an increasing federal role, especially through the IRS, and increasing self-

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38 IOWA GOVERNOR'S NONPROFIT TASK FORCE, *supra* note 6, at 2.

39 Mayer & Wilson, *supra* note 3, at 479 (quoting Sarah Hall Ingram, Comm'r, Tax Exempt and Gov't Entities, IRS, Remarks at the Georgetown University Law Center Conference: Issues in Nonprofit Governance (June 23, 2009), available at [http://www.irs.gov/pub/irs-tege/ingram\\_gtown\\_governance\\_062309.pdf](http://www.irs.gov/pub/irs-tege/ingram_gtown_governance_062309.pdf)).

regulatory requirements, standards, and burdens on nonprofit organizations. For smaller and grassroots organizations, and even for some larger ones, the prospect of increasing federal requirements, enhanced and diversified (sometimes confusing and overlapping) self-regulatory mandates and burdens, and increasing state regulation or enforcement must be daunting to consider and confront. While the roles of federal regulation and sectoral self-regulation have come together in one overseas case, that of the Philippines discussed here, there appears relatively little prospect that the models for federal use or delegation to self-regulation that have occurred with increasing frequency in other industries in the United States can be adapted to the nonprofit context. But these are initial inquiries, introductory thoughts on the theme of "federalizing" nonprofit regulation. The prospects, if any, for some sort of "federalization" of self-regulatory requirements, standards, and norms will no doubt provoke more discussion in the years ahead.