



Solicitation of Federal Civilian and Uniformed Personnel for Contributions to Private Voluntary Organizations- Sanctions Compliance Certification

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Introduction

OMB Watch is a nonprofit organization that promotes government accountability and citizen participation in public issues and decision-making. We appreciate the opportunity to comment on the proposed certification.

Our interest in the issues presented by the proposed rule go back to 2004, when the Combined Federal Campaign (CFC) added language to its funding agreement that require participating organizations to certify that they do not "knowingly employ individuals or contribute funds to organizations" listed as terrorists on various U.S. government watch lists. CFC interpreted this to impose an affirmative obligation for charities to check their employees' names, as well as groups they give money to, against the lists.

We have been a participating charity in the Combined Federal Campaign in the past, but our application for FY 2005 was rejected because we did not sign the current certification for constitutional and ethical reasons. That decision has been appealed. We are also one of 12 plaintiffs in a lawsuit challenging the constitutionality of the FY 2005 certification.

OMB Watch commends CFC's shift away from the express requirement for employee list checking that is reflected in the proposed rule. These comments suggest ways the proposed certification can be improved to provide clearer guidance and suggest that CFC develop procedures for organizations to cure any noncompliance discovered during the program year, without suspension from the program.

Flexibility in Compliance Methods Will Yield Better Results

The proposed certification for FY 2006 has three major elements:

- A certification by the charity that it is in compliance with all laws, executive orders and regulations that bar transactions with groups or individuals subject to sanctions by the Treasury Department;
- Acknowledgement of awareness of lists of blocked entities and individuals on Treasury's website; and

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- A promise to notify CFC if the group "becomes noncompliant" after the certification. CFC would then "take such steps as it deems appropriate under the circumstances," including suspension from the program and recouping funds already disbursed.

This new approach recognizes that there is a variety of ways for different types of organizations to comply with anti-terrorist financing laws. The charitable sector, including groups participating in CFC, is very diverse. These organizations engage in different types of activities, ranging from direct services to research to advocacy. There is wide variation in budget and staff size, geographic area served and governance structure. Given this wide variation, one size will not fit all, and no one method of preventing diversion of charitable funds to terrorism will ensure compliance.

CFC is wise to move in a direction that allows each organization to determine the most effective steps it can take to ensure its funds are spent solely on charitable activities. This focus on due diligence is consistent with the legal and regulatory environment in which charitable organizations operate. Flexibility is key to effectively protecting the charitable sector from those who would abuse it for illegal purposes.

Nonprofit organizations have multiple resources to assist them in this process. For example, in March a representative working group of the nonprofit sector, which included OMB Watch, developed and published *Principles of International Charity*. The Principles, which cover eight major areas, include specific examples that reflect multiple approaches charities can take to prevent diversion of funds for terrorist purposes.

The Principles are as follows:

1. *Consistent with the privilege inherent in their tax-exempt status, charitable organizations must exclusively pursue the charitable purposes for which they were organized and chartered.*
2. *Charitable organizations must comply with both U.S. laws applicable to charities and the relevant laws of the foreign jurisdictions in which they engage in charitable work. Charitable organizations, however, are non-governmental entities that are not agents for enforcement of U.S. or foreign laws or the policies reflected in them.*
3. *Charitable organizations may choose to adopt practices in addition to those required by law that, in their judgment, provide additional confidence that all assets – whether resources or services – are used exclusively for charitable purposes.*
4. *The responsibility for observance of relevant laws and adoption and implementation of practices consistent with the principles contained herein ultimately lies with the governing board of each individual charitable organization. The board of directors of each charitable organization must oversee implementation of the governance practices to be followed by the organization.*
5. *Fiscal responsibility is fundamental to international charitable work. Therefore, an organization's commitment to the charitable use of its assets must be reflected at every level of the organization.*

6. *When supplying charitable resources, fiscal responsibility on the part of the provider generally involves:*
 - a. *in advance of payment, determining that the potential recipient of monetary or in-kind contributions has the ability to both accomplish the charitable purpose of the grant and protect the resources from diversion to non-charitable purposes;*
 - b. *reducing the terms of the grant to a written agreement signed by both the charitable resource provider and the recipient;*
 - c. *engaging in ongoing monitoring of the recipient and of activities under the grant; and*
 - d. *seeking correction of any misuse of resources on the part of the recipient.*
7. *When supplying charitable services, fiscal responsibility on the part of a provider involves taking appropriate measures to reduce the risk that its assets would be used for non-charitable purposes. Given the range of services in which organizations engage, the specific measures necessarily vary depending on the type of services and the exigencies of the surrounding circumstances. The key to fiscal responsibility, however, is having sufficient financial controls in place to trace funds between receipt by the service provider and delivery of the service.*
8. *Each charitable organization must safeguard its relationship with the communities it serves in order to deliver effective programs. This relationship is founded on local understanding and acceptance of the independence of the charitable organization. If this foundation is shaken, the organization's ability to be of assistance and the safety of those delivering assistance is at serious risk.*

The full text of the Principles is available online at

http://www.cof.org/files/Documents/International_Programs/2005Publications/Principles_Final.pdf.

The new approach proposed by CFC recognizes the many structural protections against diversion of funds for non-charitable purposes that are already inherent in charitable operations and reflected in laws and regulations that govern them. For example, the Internal Revenue Service (IRS) requires a charitable organization to ensure that its funds are used for specific projects that further its mission and to keep adequate records showing the purpose of any aid it distributes, how recipients are selected, and their identity. (Rev. Rul. 68-489, 1968-2 C.B. 210 and Rev. Rul. 56-304, 1956-2 C.B.306)

The CFC application contains several certifications of financial accountability and governance that help ensure charitable funds are not diverted to terrorist organizations. For example, Certifications 5 and 6 require that the charity “accounts for its funds in accordance with generally accepted accounting principles (GAAP)” and is audited by an independent certified public accountant. Certification 7 requires that the applicant submit a copy of its most recent IRS Form 990, an annual information return that contains extensive financial data. Certifications 9 and 13 require that the group have a governing board with no conflict of interest, and that it be

chartered under the state law. Certification 15 ensures public transparency by requiring that the group prepare and publish an annual report.

The Proposed Certification Should Clarify a Reasonable Standard of Care

The language of the proposed certification should be clarified to recognize that no entity can ensure absolute compliance, and to provide a standard that allows each charity to plan its individual approach to compliance. By requiring a charity to state that it is in compliance, CFC puts applicants in the potential position of having to prove a negative- that there is no diversion of funds.

The certification used by the U.S. Agency for International Development (USAID) provides a clearer and more realistic statement. It requires every grantee to it does not “knowingly provide material support or resources to any individual or entity” involved in terrorist acts, “to the best of its current knowledge” (emphasis added). It also clearly states that checking government watch lists is something the group may do, but is not required. In fact, the certification specifies that the definition of “material support” does not include service beneficiaries or vendors, “unless the Recipient has reason to believe” that the person or entity is involved in terrorist acts (emphasis added).

The USAID certification clearly does not mandate list checking, and OMB Watch does not support list checking requirements. We do not object to certification of compliance with applicable law (which we assume is unnecessary as we must follow the laws of the land). However, this should be done in a manner that is consistent with USAID’s approach, which does not create an unreasonable burden for nonprofits.

The full text of the USAID certification is longer than is necessary for CFC, since most participants are domestic charities that do not engage in international activities.

Due Process Component Needed

OMB Watch suggests that CFC provide a process for charities that discover noncompliance with the certification during the fiscal year to cure the problem without interrupting their participation in the program. Absent negligence in oversight, the CFC should not attempt to recoup donations already received when a charity comes forward to report and cure noncompliance. Any other approach is inherently unfair and discourages charities from coming forward to report and correct problems.

Abuse of Charitable Organizations by Terrorist Groups is Rare

Certification compliance obligations should not be overly burdensome, since only a handful of U.S. charities have been accused of assisting terrorists since 2001. The background information CFC published to explain and justify the proposed rule notes a “pattern of abuse of U.S. and foreign charities” by terrorists to divert funds for illegal purposes. However, other sources of money laundering, including trafficking in drugs and weapons, cigarette smuggling and misuse of informal banking systems, present a greater danger of diversion of funds to terrorism than charities. A 2004 research paper, *Terrorism and Money Laundering: Illegal Purposes and Activities* by attorneys Victoria Bjorklund, Jennifer Reynoso and Abbey Hazlett reviewed

alleged links between charities and terrorist organizations, and found “few, if any, of these ‘links’ alleged that U.S. charities were unwittingly being used to support terrorist activities.” CFC should not include this comment in its Explanation and Justification in the final rule.

Conclusion

CFC should continue in the direction set out in the proposed rule, recognizing the diversity of the charitable sector and providing flexibility in the methods used to comply with the certification. This does more to reduce the chance that charitable funds will be diverted to terrorist purposes than a specific list checking requirement.