

Comments of the Friends of Charities Association (FOCA) on Treasury Department's 12/5/2005 "Voluntary Charity Guidelines"

The Friends of Charities Association (www.foca.net) submits these comments to the Treasury Department's "Voluntary Charity Guideline". In December of 2005 the Treasury Department issued an updated "Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities." This document was an amended version of earlier guidelines, initially issued in November of 2002. While the updated guidelines differ significantly from those released in 2002, many issues remain:

- a) The guidelines **still** assume that charities provide a major source of income to terrorist organizations;
- b) The guidelines **still** rely upon a process of designating terrorist supporters that is severely flawed;
- c) The guidelines **still** do not provide a safe harbor for charities that use their best efforts to comply therewith; and
- d) The **revised** guidelines surface a new issue – charities face sanctions based on newspaper clippings or lawsuit allegations.

We elaborate on these issues herein and provide suggestions to improve the guidelines.

Background

The Friends of Charities Association (FOCA) is a trade group composed of some of the largest Islamic charities in the world. Our members are based in both the Middle East and in Europe. FOCA shares many of the objectives that prompted Treasury to issue these guidelines. We are committed to promoting transparency and best practices among our members. Our attorneys have conducted due diligence inspections of member offices

and, as a consequence, have suggested improvements in charity practices and procedures. We encourage our members to join other organizations and associations, either in countries in which they operate or internationally, that are recognized for promoting best practices and providing capacity to enable our members to operate at the highest levels of integrity and efficiency. For example, one of our members is registered under the tough regulatory oversight of the Charity Commission of England and Wales. Other members are expected to follow in short order.

Unresolved Issues

In large part the issues that we envision that the guidelines will generate stem from the laws, regulations and practices that underlie the guidelines *rather than the guidelines themselves*. These issues include the following.

- The guidelines assume that charities provide a major source of income to terrorist organizations. As recent problems involving the Catholic Church – as well as other religious organizations – indicate, no organization is immune from abuse and misuse. Certainly, Islamic charities, which traditionally rely upon a largely volunteer workforce, have to be constantly on guard to prevent the misuse of our donors' funds. However, we do not believe funds from current FOCA members, based on our due diligence, are being diverted by charity employees to unlawful purposes. We understand, however, that some in the Treasury Department take a different view of the matter, i.e., claiming that at the very least charities have been abused by terrorist organizations. Consequently, we have repeatedly offered to enter into dialogue with the Department to investigate wrongdoing and improve the practices of our FOCA members. Although the Department has rebuffed these offers, we remain hopeful that that a useful partnership between our members and the Treasury Department will emerge in the days ahead.
- The guidelines rely upon a process of designating terrorist supporters that is severely flawed. The designation process is not transparent. It provides no meaningful opportunity to contest – or even understand in a meaningful way - the allegations that are leveled against an individual or organization. The right to counsel is subject to a license that is granted by the Office of Foreign Assets Controls (OFAC). Of course, OFAC is the entity that administers the designation process. Finally, there is no right to independent appeal of the designation. Organizations such as the Council on Foreign Relations and the 911 Commission

have acknowledged these flaws and called for reform of the designation process.

- Unlike other administrative agencies, the Treasury Department has not offered charities the protections that are afforded by a classic “safe harbor” provision. This omission impacts charities in two significant ways. The charities have less of an incentive to achieve the public policy goals which underlie the guidelines. Furthermore, the uncertainty of the degree of protection that compliance with the guidelines provides, compounded by the expense of compliance, imperils the humanitarian mission.
- Apart from the formal lists of suspect individuals and organizations that are provided by OFAC and other U.S. government organizations, the guidelines suggest that non-profit entities may be held accountable for awarding recipients humanitarian aid if those individuals and organizations have alleged ties to terrorism on the basis of information in the media or allegations in a lawsuit. Not only does this increase the burden on charities, but it also creates a situation where individuals and organizations can be identified as supporters of terrorism based on the unreliable evidence or allegations made as a result of bias or interest. One example of such an allegation (made in newspapers and lawsuits) is the assertion that Osama bin Laden founded the Muslim World League. Bin Laden was born in 1957. The League was founded in 1962, making the allegation incredible. However, under the revised guidelines, an organization might be led to question dealing with the League based on the erroneous reports.

Suggestions and Recommendations

Based on our experience throughout the world, we offer the following suggestions and recommendations to improve the current guidelines and underlying enforcement process.

Add Resources. Some of these problems generated by the current enforcement structure could be ameliorated to a degree by adding resources to OFAC and other government agencies involved in the control of terrorist financing. We have found that in many cases these organizations are unresponsive or uninformed on important matters. Undoubtedly, this is due to a lack of resources. We also believe that all government agencies need to work harder to clarify lines of communication and authority. Of course, FOIA would join with others in supporting the additional resources.

Provide Advisory Opinions. Part of the damage done by the current system flows from the uncertainty that it engenders. Individuals and organizations are uncertain as to whether certain actions or donations could result in sanctions or even criminal liability. In times of crisis, such as the recent tsunami in Asia, this sort of uncertainty can hinder much needed assistance. The issuance of advisory opinions from OFAC or other relevant agencies would ease the uncertainty and speed up the delivery of aid.

Cost-Benefit Analysis. The Department should commission an analysis of the cost and benefits of the current regulatory system and the revised guidelines.

Transmit Frozen Resources. The Department should establish a process for transmitting aid that has been frozen through the designation process to recipient populations that were originally targeted for such aid. Of course the funds could be used only for legitimate and verifiable charitable purposes. This transfer should be done with the concurrence of the targeted organization or individual. We believe that this step would do much to improve the image of the United States in the eyes of the Arab and Muslim world.

Invite Comments on the Current Process. In addition to seeking comments and input on the guidelines, the Department should broaden the dialogue by inviting input on the underlying legal, regulatory and administrative structure. This structure includes the process whereby entities are designated as supporters of terrorism as well as the related FinCen system. Based on our experience the latter can have a dramatic effect in aborting the humanitarian mission.

Conclusion

Formal Islamic charitable organizations in their current structure are a recent innovation in the Muslim world. Many of these charities comport with the highest standards of transparency and financial controls. Even for those that are lacking in these areas, the presence of a formal organization – as opposed to the practice of individuals giving cash to a worthy cause – represents an important reform by providing an organizational structure with the potential for improvement. We believe that the United States government, international organizations and other institutions should nurture rather than hinder these charities.

We all benefit from charitable giving and humanitarian aid throughout the world. Unfortunately, the current system of anti-terrorist finance regulations discourages charitable giving and keeps humanitarian aid from reaching some who need it the most. Ironically, real and threatened enforcement action against Islamic charities, including both designation and FinCen inquiries, has resulted in a move by individuals to make charitable contributions directly and in cash. This development creates obvious opportunities for terrorists to exploit.

FOCA is committed to identifying and eliminating sources of financial support for terrorism. We will work with you to this end and to improve the current approach to this important problem.