



**Comments on the U.S. Department of the Treasury Anti-Terrorist Financing Guidelines:**

**Voluntary Best Practices for U.S.-Based Charities (Issued December 6, 2005)**

*Submitted February 1, 2006*

Muslim Advocates<sup>1</sup> welcomes this opportunity to comment on the *U.S. Department of the Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities* (“revised Guidelines”) issued on December 6, 2005 by the U.S. Department of the Treasury (“Department”).

Muslim Advocates joins in and endorses the comments submitted by the Council of Foundations for the Treasury Guidelines Working Group (“Working Group”), which is a broadly representative group of U.S. charitable organizations and advisors. Muslim Advocates offers these additional comments both to highlight certain points raised in the Working Group’s comments and to add comments that we believe are of particular importance to Muslim American donors and charitable institutions, and the millions of people worldwide who are the beneficiaries of their collective efforts.

Charitable institutions, activity, and giving are an integral part of Muslim social and religious life in the United States. American Muslims have established over one thousand mosques across the country that serve the spiritual, social, and educational needs of the country’s growing Muslim community, and have formed hundreds of Muslim non-profit community and humanitarian organizations that facilitate the fulfillment of the individual Muslim religious duty to donate from one’s wealth to the poor and for other charitable causes, both in the United States and abroad. For Muslims to continue to be a viable, integrated community in America, Muslims need to be able to support and sustain their community institutions, including mosques, schools and other charitable organizations. Therefore, we believe it to be of utmost importance that the integrity of, and donor confidence in, these institutions be preserved.

We appreciate and value the Department’s willingness to engage the Muslim community in dialogue on what steps Muslim organizations can take to minimize the Department’s suspicion that Muslim charitable organizations have been infiltrated by those who would direct the organization’s assets to support individuals or entities associated with terrorism. We appreciate the improvements in the revised Guidelines over the initial version. Nonetheless, for the reasons described below and in the comments submitted by the Working Group, we have deep concerns

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<sup>1</sup> Muslim Advocates is a 501(c)(3) organization and sister entity to the National Association of Muslim Lawyers (NAML). Muslim Advocates seeks to promote freedom, justice and equality for all, regardless of faith, through legal advocacy, policy engagement, and education. For more information about us, please visit our website.

about whether even the revised Guidelines will assure the integrity of Muslim charitable institutions or improve donor confidence.

We therefore join with the Working Group in requesting that the Department withdraw the Guidelines.

**1. Department Statements that U.S.-Based Charities Have Been Infiltrated by Terrorists are Inaccurate and Should Be Discontinued**

In its introduction, the revised Guidelines include a blanket assertion that terrorists have abused U.S.-based charitable organizations and diverted donations from intended humanitarian purposes to terrorists, their activities and their support networks. Yet, the Department has failed to provide any credible documentation or data that establishes infiltration of American Muslim organizations by those who support terrorism or that the assets of such organizations have been diverted to advance terrorist activities. The Department has been involved in the closure of four U.S.-based Muslim charitable organizations based on allegations of terrorist connections. These closures, however, have failed to yield even one successful criminal conviction or acknowledgement of guilt of supporting terrorist activities. In addition, the U.S. Senate Finance Committee conducted a two-year independent investigation of 25 U.S.-based Muslim organizations, which ended without the Committee taking any further action against those organizations. Moreover, the National Commission on Terrorist Attacks Upon the United States (9/11 Commission) did not find any credible link between the closed U.S.-based Muslim organizations and al Qaeda or the attack perpetrated on September 11, 2001.

For these reasons, the American Muslim community is troubled by the Department's continued suggestion that terrorists have infiltrated U.S.-based Muslim organizations. Such misleading statements create an air of both resentment and fear that has had a significant detrimental impact on the millions of Muslim Americans and Muslim American organizations that have done no wrong. We encourage the Department to exhibit prudence in both its dialogue about and actions towards U.S.-based Muslim organizations, and to discontinue sweeping suggestions that U.S.-based Muslim organizations are being used to support terrorism.

**2. The Revised Guidelines Could Effectively Create a Mandatory Standard**

The revised Guidelines state that they are "voluntary" and that they do not supersede or modify legal requirements applicable to non-profit institutions. Nonetheless, published, official Guidelines are likely to be treated by both the Government and the non-profit sector, and particularly Muslim organizations, as de facto legal requirements. This elevation of the Guidelines to a de facto standard is particularly likely to occur in the current context, where anti-terrorism financing enforcement is active and there are no anti-terrorism regulations applicable to charitable organizations other than those that are generally applicable to all U.S. persons

As the Working Group comments note, the Office of Personnel Management in its Combined Federal Campaign, and the Internal Revenue Service in the context of audits and applications for exemption, have already started to formalize expectations that non-profit organizations will adopt the Guidelines. We would also note that the Department itself regularly

quotes from the 2003 proposed rule articulating economic sanctions enforcement guidelines as if they were law, even though they have not been issued as a final rule.<sup>2</sup>

No less importantly, Muslim charitable organizations are likely to feel pressure to adopt the Guidelines to the maximum extent possible, without regard to the fact that the Guidelines are voluntary or the reasonableness of each of the recommended measures in their particular circumstances. Though the revised Guidelines mention that they are intended to assist charities in developing a risk-based approach to guard against diversion of charitable assets, they are presented as a unified set of “best practices.” As discussed below in Section 6, Muslim organizations are anxious to take steps to overcome what they perceive to be a Government view that Muslim institutions are guilty until proven innocent. These organizations are likely to view the revised Guidelines as effectively establishing the Government’s view of the minimum requirements for seeking to overcome such a presumption and, therefore, are likely to undertake to adopt all of the guidelines even if there is no risk-based rationale for doing so and without regard to the cost of doing so.

### **3. The Recommendation that Organizational Records Be Immediately Turned Over to Regulatory or Law Enforcement Authorities is Inappropriate**

The revised Guidelines suggest that organizations, when appropriate, make board records “immediately” available for inspection by “appropriate regulatory/supervisory and law enforcement authorities.” We appreciate the importance of transparency and cooperation with government investigations. Yet, any requirement that an organization “immediately” turn over information to authorities not only threatens constitutional rights and protections against unreasonable searches and seizures, but risks compounding existing misunderstandings and fears, particularly within the Muslim community.

There already exists widespread confusion within the Muslim community about how to exercise constitutional rights and the extent to which individuals and organizations may decline to volunteer information without first consulting legal counsel when approached by law enforcement officials. Official guidelines suggesting that immediate production of records is in order if requested by the government will only exacerbate this confusion. The qualification in the Guidelines that such records be made available for inspection “when appropriate” is ambiguous and, in any case, carries little meaning when used in conjunction with an urging of “immediate” production.

Official guidelines recommending immediate release of information also serve to reinforce the widespread fear, particularly among Muslim Americans, that the Government will view failure to volunteer all information immediately as evidence of wrongdoing. As a result, this recommendation could have a chilling effect on lawful, perhaps even constitutionally protected activities by deterring Muslims from establishing or continuing to operate religious, educational and other charitable organizations.

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<sup>2</sup> 68 Fed. Reg. 4422 (Jan. 29, 2003).

**4. The Recommendation that Due Diligence Include Internet Searches is Ambiguous and Harmful**

The revised Guidelines call for charitable institutions to conduct Internet searches to determine whether a recipient is suspected of activity related to terrorism, including terrorist financing or other support. We agree with the conclusion of the Working Group that such methods are ineffective and burdensome and that such determinations are properly the role and responsibility of law enforcement authorities.

We are particularly concerned that the revised Guidelines create the impression that any accusations published on the Internet should lead a grant-making organization to refuse to support the accused entity, regardless of the accuracy of the accusation or its source. This could have significant detrimental impact on the ability of U.S. Muslim organizations to obtain domestic sources of funding, particularly at a time when these organizations are trying to limit to the maximum extent their reliance on foreign sources of funding.

Unfortunately, the Internet frequently facilitates the publication of false information and baseless accusations in a manner that makes it virtually impossible for viewers to evaluate the reliability of the information. Few prominent Muslim organizations have been spared from such defamatory publicity propagated by a minority of extreme individuals who seek to feed popular misunderstanding of Islam and question the patriotism of Muslim Americans. Even sophisticated grant-makers may be reluctant to support legitimate, law-abiding Muslim organizations for fear that a grant to any organization that has been the subject of an accusation on the Internet would be contrary to the revised Guidelines and, therefore, would open them to charges of proceeding in deliberate disregard of such publicly available information.

Particularly with respect to U.S.-based recipients, the Guidelines should not create the impression that accusations published on the Internet provide knowledge or reason to know that such recipients will use contributions for illegal purposes. It is well within the ability of the Government to take formal steps — such as listing on the Specially Designated Nationals (“SDN”) List or revocation of tax exemption — to notify the public that such organizations are known to support terrorist organizations.<sup>3</sup>

**5. The Expectation That Charities Will Obtain Certifications From Recipients is Impractical and Onerous**

The revised Guidelines call for charities to require recipients to certify that they do not deal in any way with any individuals or entities that are sanctioned by the Office of Foreign Asset Control (“OFAC”) or with any persons known to the recipient to support terrorism.

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<sup>3</sup> We note that even the Government does not have a practice of publicly terminating investigations or exonerating parties that have been subject to investigation, even where the grounds for initiating the investigations have been found to have no merit. The most recent egregious example is the Senate Finance Committee’s suggestion that, although it had intentionally publicized its investigation of 25 U.S. Muslim charities, including some of the largest community-based Muslim organizations for which the Government has made no accusations of wrongdoing, and although it admittedly found nothing additional to pursue after two years, it would not close its investigation. If, in this and other cases, the Government has not found sufficient information to revoke tax-exempt status or freeze the assets of such charities, it should not create the impression that they are not legitimate recipients of charitable contributions.

Particularly in the context of foreign charitable work, this guideline is unclear, impractical, and onerous.

First, the term “recipient” is used in a variety of ways, and as such it is unclear from whom the U.S. charity should be seeking a certification. The term “recipient” could apply to an organization that receives a grant or supplies from the U.S. charity, or it could apply to the individual that receives direct aid in the form of housing, food, or medicine. The failure to define this term makes this guideline particularly confusing and too ambiguous to implement.

Furthermore, the certification requirement is unworkable because foreign charities generally will not be able to make the expected certification reliably — both because they may not have knowledge about each individual who receives assistance and because they may not have the resources to screen recipients against the SDN List. It is highly unlikely that a foreign charity providing disaster assistance to individuals, for example, will have either identifying information for each individual sufficient to ensure that such person is not on the SDN List or the ability to check those names it does have against the SDN List. Even if a recipient, such as an educational institution, has sufficient identifying information, an accurate certification is likely to be extremely burdensome. Given this nature of international charitable work, it will be a rare occasion when a certification would be possible or, if executed, would be reliable.

## **6. Adherence to the Revised Guidelines May Not Restore Donor Enthusiasm**

As a result of donor confusion and fear, Muslim charitable organizations have lost significant potential donations since 2001. The Introduction to the revised Guidelines observes that abuse of charities has threatened to undermine donor confidence, and it appears that some of the recommendations in the revised Guidelines are intended to address donor confidence in well-meaning charities. We believe, however, that a significant factor in weakened Muslim donor enthusiasm is donor concern that the Government engages in aggressive, baseless enforcement activities with respect to U.S.-based Muslim charities — not a belief that contributions to these well-meaning charities will be improperly diverted. In fact, we are concerned that Government conduct has resulted in a chilling effect on charitable giving and deterred many in the Muslim American community from donating to worthy, needed organizations.

The confidence of donors in the country in general was arguably undermined by the apparent misrepresentation by certain U.S. organizations of how they used donated funds and by the subsequent freezing of their assets by OFAC. It should be recognized, however, that in the Muslim community, there remains strong conviction that Muslim American charitable organizations are law abiding and present no real risk of diversion of funds to support terrorism. Rather, a major, persistent factor in the weakening of charitable giving in the Muslim community is the continuing perception, whether accurate or not, that the civil liberties of the community as a whole have been targeted by lawmakers and law enforcement, that government investigations are arbitrary, capricious, without basis in fact and perhaps politically motivated, that there is a presumption of guilt by association, and that there is a presumption of guilt until proven innocent. As a result of these perceptions, many Muslim Americans do not contribute, contribute in cash only, or contribute less for fear of having their names turn up in government investigations with the potential consequence of loss of privacy, loss of employment, public humiliation, criminal prosecution, adverse immigration enforcement action, or possibly arbitrary

detention — simply because they made an innocent contribution to what they knew to be a well-meaning charity.

Some organizations in the Muslim community have reacted to this situation by calling for government guidance or approvals that may enable them to convince donors that there is no risk of government investigation. Understandably, the Government has declined to issue lists of approved charities or to recognize compliance with the revised Guidelines as a complete defense against prosecution. The Government should be aware, however, that the revised Guidelines are unlikely to restore Muslim donor confidence that such charities will not be subject to arbitrary investigation. Until confidence in the Government's commitment to respecting the civil rights and civil liberties of Muslim Americans is fully restored, enthusiasm about donating to Muslim charitable institutions will not significantly improve.

We welcome the opportunity to engage with the Department and other Government agencies to share our views on this matter further.