



**Comments on the U.S. Department of the Treasury
Revised Anti-Terrorist Financing Guidelines (70 FR 73063)
February 1, 2006**

OMB Watch is a national nonprofit that promotes government accountability and citizen participation in public issues and decision-making. Because of our commitment to strengthening the voice of the nonprofit sector in the democratic process, we work to protect their advocacy rights and educate them about laws and regulations that impact their advocacy work. Since the original Guidelines were issued in 2002 we have been concerned about the potential negative impacts, including the right to participate in the democratic process, Treasury's Anti-Terrorist Financing Guidelines (Guidelines) could have on public charities that operate in the United States.

In 2003 we submitted comments to the Internal Revenue Service on the original Guidelines, and participated in Treasury's April 2004 outreach meeting. Since that time we have been an active member of a working group of charities and foundations that drafted *Principles of International Charity*, which was submitted to Treasury in March 2005 as a suggested alternative approach to the Guidelines.

We appreciate Treasury's increased transparency in seeking public comment on the revised Guidelines through publication in the Federal Register. While we also commend Treasury for clarifications and some modifications in the revisions of December 2005, we join in and fully support the working group's comments, submitted through the Council on Foundations, calling for their withdrawal. These comments supplement the information provided by the working group, from the perspective on a non-grantmaking charitable and educational organization that works on domestic issues.

General Comments

The goal of the Guidelines is laudable and we fully support Treasury's efforts to prevent diversion of charitable assets to terrorists. However, the Guidelines are not the best way to achieve this goal. There are several reasons:

1. The voluntary nature of the Guidelines is questionable, given the broad powers Treasury has under the Patriot Act and Executive Order 13224 to seize and freeze charitable assets based on secret evidence and without meaningful recourse for affected charities. The nonprofit sector is very aware of these draconian powers and the fact that there is no protection from mistake or abuse in their application.

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2. Treasury's emphasis on broad information collection and reporting by charities and foundations indicates a lack of focus in its program to stop diversion of funds to terrorism. Rather than focused investigations that take advantage of leads, Treasury is seeking to amass vast amounts of information that is likely to be useless. This approach has been widely criticized as failing the most basic cost effectiveness standards.
3. The Guidelines continue to take a one-size-fits-all approach, despite the general statements about flexibility.
4. Confusion and fear is now driving charities to undertake administrative formalities in an attempt to shield themselves from liability, regardless of the fact that there is no safe harbor from sanctions, and regardless of good faith efforts to prevent diversion of funds to terrorists. Treasury continues to make it clear that, even if an organization implements every suggestion in these Guidelines, it can be shut down without notice or recourse if Treasury decides to do so. This is unreasonable and unproductive. Charities that do everything they can to protect their funds should not have to live under such a threat. Instead, there should be safe harbor procedures, opportunities to cure problems, and intermediate sanctions that allow charitable programs to continue to serve their intended beneficiaries.
5. As grantmakers become even more risk averse, it will come at the cost of programs best positioned to reach out to vulnerable populations and address the political and economic hardships at the root of terrorism. According to the Foundation Center's latest report on International Grantmaking, "78% of foundations agree with the statement "It is now more difficult to fund internationally due to a more demanding and uncertain regulatory environment."¹
6. Parts III-V, which address governance and transparency, are outside OFAC's area of expertise, and are not relevant to the goal of preventing diversion of funds to terrorists. The only thing these sections will accomplish is to create confusion for nonprofits, who already must comply with IRS, state and local regulations.
7. The Guidelines are being used by other regulatory agencies in ways that conflict with their supposed voluntary nature. For example, on November 7, 2005, CFC issued a final rule (5 CFR Part 950 Solicitation of Federal Civilian and Uniformed Service Personnel for Contributions to Private Voluntary Organizations--Sanctions Compliance Certification Monday, November 7, 2005) which applies to 2006 CFC applicants and requires participating charities to certify that they are in compliance with existing anti-terrorist financing laws. OPM's explanation of the new rule states that CFC participants should comply with the Guidelines.

A number of state run charitable campaigns have also begun requiring applicants to certify compliance with new counter-terrorism compliance programs. For example, the New Jersey State Employee Charitable Campaign requires nonprofits to check-off compliance with seven criteria. This same form is being used by some United Ways, apparently because they think they are required to do this. For example, the United Way of Metropolitan Chicago wrote

¹ The Foundation Center, International Grantmaking III: An Update on US Foundation Trends, 2004

nonprofit executives on September 30, 2005, saying, “In compliance with the USA PATRIOT Act and other counter terrorism laws, the United Way of Metropolitan Chicago is required to implement a compliance program designed to detect and prevent the flow of funds to terrorist and/or terrorist organization.” The form is identical to the New Jersey form and indicates that nonprofits should certify in order to show “it is in compliance with the United Way of Metropolitan Chicago and the United Way of America’s (“UWA”) compliance program.

This strategy is unlikely to yield any tangible benefits because, as many have pointed out, there is little reason to expect that a terrorist would refrain from signing such a document. In fact, the true targets of this misguided approach are organizations that sign these letters in good faith and face crushing sanctions if they fall prey to bad actors: the very groups we are purportedly trying to protect from abuse.

Specific Comments

We have included our specific comments below, indicating positive changes made by Treasury and new problems generated by the revised version. These specific comments in no way imply that OMB Watch endorses revisions we have not had the opportunity to see and comment on.

I. Introduction

The new version indicates that the Guidelines are “to assist charities that attempt in good faith to protect themselves...” But, as we have noted, compliance with the Guidelines does not provide any legal protection to any individual or charity. In addition, Treasury also emphasizes flexibility in applying these Guidelines utilizing a risk-based approach that is appropriate for the situation and group. Yet the body of the Guidelines provides very limited flexibility or alternatives. The Guidelines read like a regulation or compliance guide.

The following language represents a very significant problem in the Introduction:

“Investigations have revealed terrorist abuse of charitable organizations, both in the United States and worldwide, often through the diversion of donations intended for humanitarian purposes but funneled instead to terrorists, their support networks, and their operations. This abuse threatens to undermine donor confidence and jeopardizes the integrity of the charitable sector, whose services are indispensable to both national and world communities. (emphasis added)”

There is no footnote, data or justification for the italicized sentence. Public evidence runs contrary to this statement. U.S. charities have not been major conduits for terrorist activities and to imply that they are is slanderous.

A report released in August of 2004 by the independent commission to investigate the 9/11 attacks raised "substantial civil liberty concerns" regarding the government's shutdown of two Chicago-area Islamic charities, the Global Relief Foundation (GRF) and Benevolence International Foundation (BIF). “Indeed,” the report points out, “despite unprecedented access to

the U.S. and foreign records of these organizations, one of the world's most experienced and best terrorist prosecutors has not been able to make any criminal case against GRF and resolved the investigation of BIF without a conviction for support of terrorism." In addition, a 2004 report, *Terrorism and Money Laundering: Illegal Purposes and Activities*, by Jennifer Reynoso, Victoria Bjorklund and Abbey Hazlett of the law firm Simpson, Thacher & Bartlett, LLP found that diversion of funding to terrorism is most likely to occur when an individual acts out of ideological and criminal motivation, in some cases using charities for these purposes, rather than a deliberate act by the charity itself. None of the cases involved diversion of funds by a U.S. based grant maker to a foreign organization "where the diversion would have been uncovered but for the lack of appropriate due diligence..." and evidence of "links" to terrorist organizations has not resulted in criminal convictions.

Treasury must provide detailed and accurate information that distinguishes U.S. charities from others, rather than making sweeping negative statements.

II. Fundamental Principles of Good Charitable Practice

The principles cited, while good, conspicuously omit any reference to the positive contribution charities make to alleviating poverty, protecting human rights and contributing to resolution of conflict in war torn areas of the world. This omission implies a fundamental lack of understanding of the mission and role of the charitable sector on the part of Treasury officials.

Instead, Treasury seems to assume charities and foundations are extensions of government, rather than the independent sector that we are. The language describing the importance and benefits of this independence in the *Principles of International Charity* was notably excluded from the list of principles here. Treasury should carefully re-examine its assumptions about the nature and role of the nonprofit sector.

III. Governance

Positive changes made in this section include three provisions of the 2002 version that were dropped: that the board should meet at least three times annually with the majority of members attending in person, that a charity should not engage in transactions with entities in which a board member has a conflict of interest (The earlier version was inconsistent with IRS standards.) and the statement that an independent governing body cannot have more than 20% of board members or executive committee members receive direct or indirect compensation from the organization (The earlier version was inconsistent with IRS standards.).

However, Section B2 adds a new provision that indicates the board is responsible for the organization's compliance with laws and this Guidance. So even though the Introduction encourages flexibility in implementing risk-based approaches, this provision implies the principles of the Guidelines should be implemented. This should be clarified.

Section B4 appropriately modifies the 2002 recommendation that records of organizational decisions be available for public inspection, but takes two steps backwards by recommending that such records are to be made available *immediately* to regulatory/supervisory and law

enforcement authorities. The definition of these “authorities” is not provided. It is not clear the breadth of reach this automatic investigative authority would have. For example, does this mean that authorities can obtain records without subpoenas or search warrants that are otherwise required by law?

IV. Financial Practice/Accountability

We appreciate the positive change from the 2002 version that drop the recommendation that charities should not make cash disbursements. The new version recognizes that cash assistance is necessary in certain circumstance. The new Guidelines recommend providing cash disbursements in small amounts to be used over a short period of time

However, the provisions on audits are inconsistent with legal standards, such as OMB Circular A-133, and do not appear to have any basis in practice or policy. We find it strange that OFAC would put itself in the business of setting such standards, which are governed by the IRS and Congress.

V. Disclosure/Transparency in Governance and Finances

A. Information Collection About Board Members.

This section continues problematic provisions of 2002, while adding a gratuitous comment about “fully respecting individual privacy rights”. It still does not define “subsidiaries or affiliates.” Collecting social security numbers and home addresses of board members may be a violation of an individual’s privacy. This is particularly true since the records are to be “immediately” available to a range of “authorities”. These new standards go far beyond the requirements of the IRS Form 990.

B. Key Employees

The definition of key employees is expanded to include “employees that exercise substantial influence” over the activities of the organization, not just the highest paid employees. This also now goes beyond the IRS Form 990. Moreover, it would be difficult to figure out what to make public. For example, the five highest paid employees may not be the five most influential employees. This provision should be dropped.

C. Public Disclosure of Distribution of Resources and Services

There are no definitions of “branches, subsidiaries, and/or affiliates.” Depending on the definition, this might become onerous.

There is still an implicit assumption that the organization will prepare an annual report that goes beyond the scope of the IRS Form 990, as well as an audit. The audit applies to all charities, not just those with gross income exceeding \$250,000, as described above. This is unrelated to the purpose of preventing diversion of funding to terrorists, and should be dropped.

D. Supplying Resources

This new provision seems to imply that any level of money transferred or in-kind contributions provided is now considered a grant. And that triggers a host of requirements, including a

“written agreement,” “ongoing monitoring,” and a determination that the recipient has the ability to “protect the resources from diversion to non-charitable purposes.” This set of standards may discourage collaboration among charities, particularly in sharing in-kind contributions

E. Supplying Services

This new set of standards is quite broad and invasive. Presumably, this means any charity providing a service, such as drug counseling or crime prevention, would need to establish “appropriate measures” to make sure the recipient does not take drugs, commit a crime, or undertake other non-charitable purposes. It not only must have “controls” to trace the delivery of service, but also the “use by the recipient.” This is unrealistic for U.S. based providers of charitable services to implement. Treasury should limit the scope of this section to grants or activities that clearly are relevant to anti-terrorist financing purposes.

F. Solicitations for Funds

Adds a new provision that the charity should publicly disclose when funds are being used for a purpose other than for which they were solicited. This should be dropped. Solicitation of funds is already regulated by federal, state and local governments.

VI. Anti-Terrorist Financing Best-Practices

The scope has broadened to apply to all recipients, not just foreign recipients. Thus, it now applies to all U.S. charities, regardless of whether work is being done overseas. It covers in-kind contributions also, which makes it clear that its reach is far beyond grantmaking foundations. It recommends a risk-based approach with respect to foreign recipients, but apparently not with U.S. recipients. This does not make sense, since U.S. recipients can have very low risk.

This section makes frequent use of the word “should” when the Guidelines are supposed to be flexible and voluntary. The phrase “best practices” implies that other measures a charity might take to protect its assets from abuse would somehow fall short. This makes the Guidelines internally inconsistent.

A. Information Collection About Recipients

The unrealistic collection suggestions include a new provision which urges charities to “undertake reasonable efforts to uncover” individuals and organizations that may have changed names or organizational structure to avoid being associated with questionable activity. It also broadens the scope of information gathering by calling for historical information about a recipient, including where incorporated, but also information about the people who started the organization and copies of incorporating or governing instruments. These should be dropped.

Collecting the address and phone number of all places of doing business of a recipient might be difficult with a national nonprofit which chapters throughout the country. In addition, collecting names and addresses of organizations that receive funding, services or material support from the

recipient, and the names and addresses of individuals “to the extent reasonably discoverable” may not always be relevant to anti-terrorist financing purposes.

B. Basic Vetting of Recipients

The Guidelines no longer call for checking multiple lists, which is an improvement. Instead, the Guidelines recommend that a charity check Office of Foreign Assets Control’s (OFAC) Specially Designated Nationals list. However, the Guidelines encourage a long list of parties to check- “key staff” at the principal place of business, “key employees, board members, or other senior management” at the principle place of business. Key employees include the highest paid or most influential employees. Additionally, such information was suggested to be collected from “senior employees” at other business locations; now it is “key employees.” This may not be relevant to anti-terrorist financing purposes. The Guidelines should emphasize that the degree to which an organization uses the lists should depend on its assessment of its vulnerability to diversion of funds to terrorists.

The new provision that expands information collection to other publicly available information to see if the individuals are suspected of terrorism puts charities in the position of doing the investigative work of government. This should be dropped.

D. Reporting Information to Government

This calls on charities to report any individuals or recipients to OFAC if the name is on the SDN list. Additionally, the new Guidelines indicate a charity “can provide” information on “any suspicious activity” through a referral on the Treasury Department’s website. It states the charity should also report the activity to the FBI.

This applies to any of the key employees within the charity, any recipients, or any key employees, board members, or other senior management of recipients. Key employees refers to “highly compensated” people or those who “exercise substantial influence over the day-to-day operations” of the organization. Recipient refers to any entity – U.S. or foreign – that receives funding or in-kind contributions of any amount.

The new provision that expands information collection to other publicly available information to see if the individuals are suspected of terrorism puts charities in the position of doing the investigative work of government. These provisions place charities in the role of government and should be dropped.

Conclusion

We believe the good work of the charitable sector is the best contribution it can make to preventing terrorism. Treasury should re-consider its approach to the sector and view us as a beneficial force, and not on the same level as the drug dealers, gem smugglers and money launderers that we believe are the real danger when it comes to funding terrorist organizations.